Supreme Court, U.S.
FILED
NOV 1 - 2006
OFFICE OF THE CLERK

No. 06-642

IN THE

Supreme Court of the United States

DIEGO F. CASTILLO-ARIAS, MARTHA L. RINCON-ESCOBAR, ANDRES F. CASTILLO-RINCON, AND DIEGO F. CASTILLO-RINCON,

Petitioners,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL DEAN RAY
Counsel of Record
NEIL DWIGHT KOLNER
Liberty Building
124 South Miami Avenue
Miami, Florida 33130
(305) 377-9000

QUESTION PRESENTED

The Immigration and Nationality Act authorizes the Attorney General to grant an alien asylum if the alien cannot return to another country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, *membership in a particular social group*, or political opinion." §101(a)(42)(A), 8 U.S.C. §1101(a)(42)(A). The statute provides no definition of "particular social group".

The Eleventh Circuit previously found that Petitioners were threatened with harm by the Cali, Colombia drug cartel *on account of their membership in a particular group*. But, the court of appeals remanded for decision in the first instance, whether the asylum definition of "particular social group" includes non-criminal informants working against the Cali drug cartel. On remand, the Board of Immigration Appeals (BIA) ruled that volunteer, noncriminal informants, working against the Cali drug cartel, *do not* constitute a "particular social group" because such informants lacked the necessary social visibility to be recognized, and members of the group are too numerous. The court of appeals, "with consternation" deferred to the BIA's interpretation.

The question presented is whether under asylum law, "membership in a particular social group" includes volunteer, non-criminal informants working against the Cali drug cartel, in that they share an immutable characteristic and are socially visible enough, under both the INA and the United Nations High Commissioner for Refugees' Guidelines on International Protection.

TABLE OF CONTENTS

Page

Question Presented i
Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 3
Reasons for granting the petition 9
Conclusion 14

Appendix A (court of appeals' opinion on Petition for Review of a Decision of the Board of Immigration Appeals (Apr. 20, 2006) 1a

Appendix B (decision of the Board of Immigration Appeals, Aug. 13, 2004) 21a

Appendix C (court of appeals' opinion on Petition for Review of an Decision of the Board of Immigration Appeals (Aug. 25, 2003) ... 40a

Appendix D (decision of the Board of Immigration Appeals, Mar. 20, 2002) 54a

Appendix E (Jul. 31, 1997 Oral decision of the Immigration Judge) 57a

Appendix F (court of appeals' order on Petition for Rehearing and Petition For Rehearing En Banc, Aug. 4, 2006) 73a

TABLE OF AUTHORITIES

Cases:

Matter of Acosta,
19 I. & N. Dec. 233 (BIA 1985) 4, 11

Alabama Power Co. v. Fed. Energy Regulatory Comm'n,
22 F.3d 270 (11th Cir. 1994) 10

Gonzales v. Thomas, No. 05-552
petition for cert. filed (U.S. Oct. 31, 2005) ... 14

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 11, 14

Statutes and treaties:

Statutes:

Immigration and Nationality Act, 8 U.S.C. 1101,
et seq. ..... I, 1, 2, 3, 9
8 U.S.C. § 1101 (42) (A) ..... I, 2, 3, 9
8 U.S.C. § 1158 (b)(1)(A) 2, 3

Treaties:

1967 United Nations Protocol Relating to the
Status of Refugees 11, 14

PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 446 F.3d 1190. The decision of the Board of Immigration Appeals on remand (Pet. App. 21a) is reported at 23 I. & N. Dec. 951. The opinion of the court of appeals (Pet.App. 40a) remanding the case, the first decision of the Board of Immigration Appeals (Pet. App. 54a), and the decision of the immigration judge (Pet.App. 57a), are unreported.

JURISDICTION

The court of appeals entered its opinion and order on April 20, 2006 (Pet. App. 1a); and entered an order denying rehearing on August 4, 2006 (Pet. App. 73a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 8 U.S.C. § 1101(a)(42) provides in pertinent part:

§ 1101. Definitions

(a) As used in this chapter--

* * * * *

(42) The term ``refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any

country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. * * *

8 U.S.C. § 1158 provides in pertinent part:

§ 1158. Asylum
* * * * *

b) Conditions for granting asylum

(1) In general

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

STATEMENT OF THE CASE

The Eleventh Circuit was "dismayed that these petitioners, who risked their lives and the safety of their families to assist our nation's allies in the 'war on drugs', have been ignored by our nation." Pet. App. 20a. The court of appeals "with consternation" concluded that petitioners do not qualify as "refugees" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, based on the Board of Immigration Appeals' (BIA) interpretation of the phrase "particular social group". Pet. App. 2a. The BIA determined that petitioners were not eligible to be considered refugees because, despite being members of a group of "non criminal informants working against the Cali drug cartel", that group was **not** a *"particular social group"* under the INA.

The court of appeals explained that it was bound to defer to the BIA's statutory interpretation of "particular social group" if reasonable, and thus, deny the petition for review. Yet, the court of appeals held out hope that "the compelling facts in this case and its troublesome resolution" might be the impetus for legislative relief to protect these petitioners and others like them. Pet. App. 20a.

1. a. The INA defines a "refugee" as an alien who is unwilling or unable to return to his or her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). If the "Attorney General determines" that an alien is a "refugee," he may, in his discretion, grant the alien asylum in the United States. 8 U.S.C.1158(b)(1)(A), as amended by REAL ID § 101(a), 119 Stat. 302. In addition to the discretionary relief of asylum, mandatory withholding of removal is available if "the alien's life or freedom would be threatened in [the

country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A).

b. The phrase "particular social group" in the definition of "refugee" and in the provision for withholding of removal is not further defined in the Act. The Attorney General, through the Board, has interpreted "particular social group," at a general level, to mean a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The group characteristic, at a minimum, must be one which "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences". *Matter of Acosta*, 19 I.& N. Dec. 211, 233 (BIA 1985) But what specific "particular kind of group characteristic" which constitutes a "particular social group" the Board found, is best determined on a "case-by-case basis." *Ibid.*

2. Petitioners, a husband, wife, and two minor children are natives and citizens of Colombia who entered the United States as visitors and then applied for asylum. The lead petitioner, Diego Castillo-Arias was born and raised in Cali, Colombia, the headquarters of the infamous Cali drug cartel. Joined by his wife, Martha Rincon-Escobar, and his two sons, Andres Castillo-Rincon and Diego Castillo-Rincon, Castillo-Arias operated a bakery in Cali and resided in the city until 1996. During that time, Castillo-Arias was an acquaintance of Arturo Davila, a former policeman in the Cali Police Department who, after being fired for corruption, became the chief of security for the Cali cartel. Castillo-Arias also happened to be a good friend of Vladimir Martinez Meza, who was responsible for investigating and prosecuting narcotics traffickers in Cali.

Between 1990 and 1994, Davila would visit Castillo-Arias's bakery on the weekends and chat openly and brazenly about his involvement with the Cali cartel. During these conversations, Davila would identify people, places and events related to the cartel's exportation of narcotics from Colombia to the United States and Europe. Castillo-Arias, as a civic-minded citizen of Cali, passed the information he learned from Davila along to Meza. He told Meza about Davila's statements that the cartel had declared war against the Colombian government and that the cartel would kill politicians who oppose it. Castillo-Arias also disclosed the extent, location and size of the assets of the Cali cartel, including banks, bank accounts, mansions, haciendas, and villas both within and outside Colombia.

Castillo-Arias's good deeds would not go unpunished. On May 15, 1995, as Castillo-Arias was watching his son Andres ride his bicycle in the street, a car suddenly blocked their path and three men emerged armed with pistols and an automatic weapon. The men tried to force Castillo-Arias into the car, but he resisted and was pushed to the ground and beaten. His beating caused Andres to scream loudly, and one of the men pistol-whipped Andres in the face. Andres's screams and the accompanying commotion prompted people in the neighborhood to emerge from their homes, and the men fled in their car. As they departed, they told Castillo-Arias that things would only get worse for him and his family. Castillo-Arias then took his son to a clinic, where he needed reconstructive surgery to repair his mouth and jaw.

The Castillos went to Castillo-Arias's parents' home in the northern section of Cali for the rest of the month. Castillo-Arias attempted to rent his bakery while they were away, but his lessees were intimidated by individuals who would inquire about him, and on more than one occasion, a lessee was harmed after he refused to divulge information

regarding Castillo-Arias's whereabouts. Although Castillo-Arias had never been involved in politics and had never testified against the cartel in a drug trial, Meza recommended that Castillo-Arias go into hiding and, ultimately leave Colombia. Meza left Colombia for Spain, and it appears that Davila may have been murdered.

3. The immigration judge denied asylum and withholding of deportation. Pet.App. 72a. The immigration judge found lead petitioner to be a credible witness, and that the documentary evidence provided in support was also credible. The immigration judge explained:

> **[T]he basis for asylum in this case is the retaliation against the [lead petitioner] and all members of his family because of his voluntary decision to be an informant against the Cali Cartel.** It is clear from his testimony and the documents provided that **that, in fact, is the reason why they threatened him with harm and why he was forced to leave the country.** Because no nexus has been drawn or shown between the attack of May 15, 1995 against the respondent and his son and subsequent threats of attack, the Court can only conclude that absence [sic] such nexus, the Court is not in a position, particularly given the narrow delegation of authority from the Attorney General to the Immigration Court pursuant to 101(b)(4) of the Act, defined such nexus.

Pet.App. 71a (emphasis added). Therefore, the immigration judge concluded that the petitioners were ineligible for asylum.

4. The Board of Immigration Appeals dismissed the Castillo's appeal. The Board upheld the Immigration Judge's order finding that the record "contains insufficient

evidence that there was any motivation behind the actions of the cartel members against the respondent, other than revenge for the aid he provided to the government." Pet.App. 56a. The Board further held that the people who threatened the Castillos did so "due to personal motives and not due to any political opinion imputed to the lead respondent." Pet. App. 55a. The Board did not initially decide whether the Castillos were persecuted due to their membership in a particular social group.

5. The Eleventh Circuit upheld the Board's finding that there was no persecution due to political opinion, but deemed erroneous the Board's conclusion that "the record contains insufficient evidence that there was any motivation behind the actions of the cartel members against [Castillo-Arias], other than revenge for the aid he provided to the government." The court of appeals found that the BIA's conclusion was not supported by substantial evidence, and instead found that "Castillo-Arias has produced evidence from which **it is reasonable to believe that the harm was motivated by his membership in a group** composed of non-criminal informants." Pet. App. 51a (emphasis added). The court of appeals remanded so the BIA could decide in the first instance whether non-criminal informants constitute a "particular social group" under the INA, because the Board had not specifically done so. Pet. App. 52a.

6. *The BIA decision on remand.* Upon remand the Board found that non-criminal informants against the Cali drug cartel did not constitute "a particular social group" within the definition under the INA:

> Given the voluntary nature of the decision to serve as a government informant, the lack of social visibility of the members of the purported social group, and the

> indications in the record that the Cali cartel retaliates against anyone perceived to have interfered with its operations, we find that the respondent has not demonstrated membership in a particular social group.

Pet. App. 38a. The Board held that since the Cali cartel directs harm "against anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises", the Castillos were not any different "than anyone who has crossed the Cali cartel or who is perceived to be a threat to the cartel's interests." Pet. App. 37a.

7. *The second Eleventh Circuit opinion.* The Castillos filed a second Petition For Review in the court of appeals after the BIA remand decision. The court of appeals found the BIA's decision to be reasonable: "The risk of persecution alone does not create a particular social group within the meaning of the INA, as virtually the entire population of Colombia is a potential subject of persecution by the cartel." The court of appeals reasoned that the group's "defining attribute" was "persecution by the cartel." Pet. App. 18-19 a.

Petitioners filed on Feb. 27, 2006, as part of a Notice of Supplemental Authority, ¶1, "Colombia UNHCR's Protection and Assistance Programme for IDPs and Refugees 2003: which states one of Colombian President Alvaro Uribe's election proposals to create a network of one million civilian informants for the police and army is now taking shape.

The Eleventh Circuit denied Petitioners' Petition for Rehearing and Petition for Rehearing en banc. Pet. App. 73a.

This petition relates to a court of appeals decision pertaining to a deportation proceeding commenced before April 1, 1997, in which the BIA issued its final order after

October 31, 1996. Therefore, the jurisdiction in the court of appeals arose under former Section 106(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1105(a)(1994) (repealed), as modified by "transitional rules" of judicial review in Section 309(C)(4) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. 104-208, 110 Stat. 3009 (Sept. 30, 1996), reprinted in 8 U.S.C. § 1101 (history).

REASONS FOR GRANTING THE PETITION

First, certiorari should be granted in this case because neither statutes, regulations nor case law provide a definition of what is a "particular social group" for purposes of granting asylum under the Immigration and Nationality Act. Nor do they address the issue of whether a confidential informant against the Cali drug cartel constitutes a "member of a particular social group." In fact, no other case law could be found deciding the issue of whether confidential informants are "members of a particular social group" for asylum purposes.

As the Board of Immigration Appeals recognized in deciding this case below: "Neither the statute, regulations, or case law provide a definitive answer as to whether 'non-criminal drug informants working against the Cali drug cartel' constitute a particular social group. Pet. App. 32a.

Similarly, the court of appeals explained:

> Congress did not directly speak on the issue of what constitutes a 'particular social group,' one of the five listed categories that qualify for refugee status or withholding or deportation, within the meaning of the INA. See 8 U.S.C.§1101(a)(42)(A); id. § 1253(h)(1)(1994) (now codified at 8 U.S.C.

> §1231(b)(3)(A)). Accordingly, we must follow the BIA's determination that noncriminal informants working against the Cali cartel are not a social group under the INA unless the interpretation is unreasonable, i.e., arbitrary, capricious or clearly contrary to law. See *Alabama Power Co. v. Federal Energy Regulatory Comm'n.*, 22 F.3d at 272 (11th Cir. 1994).

Pet. App. 12a.

The court of appeals' decision upholding the denial of Petitioners' claims for asylum and withholding of removal is based upon an unreasonable misinterpretation and unduly-narrow application of asylum law and principles, specifically: the United Nations High Commissioner for Refugees (UNHCR) guidelines on particular social group definitions dealing with the issues of visibility and numerosity and immutability.

The decision adversely affects the Castillos and countless others who fall or may fall within the group of 'noncriminal informants working against the Cali drug cartel'. Our government spends millions of dollars to fight the "war on drugs". This Court should grant certiorari to give guidance to the courts so that numerous informants who have and who will risk their lives to fight the United States-sponsored drug war in Colombia will not be left unprotected from violence, murder and other forms of persecution should they seek protection in the form of asylum.

Guidelines do exist for defining "particular social group" which were created by an Expert Roundtable organized by the United Nations High Commissioner for Refugees, and the International Institute of Humanitarian Law, San Remo, Italy, 6-8 September 2001, "Summary

Conclusions: membership of a particular social group". These standards include those for defining social perception, role of persecutors in defining social group and the irrelevance of the size of the group.

However, these guidelines appear to have been overlooked and/or misconstrued by both the Board and the court of appeals decisions, in spite of the Eleventh Circuit's acknowledgment:

> Reference to the UNHCR Guidelines by the BIA in elucidating the Acosta formulation is permissible because **the U.S. Supreme Court has held that Congress intended to conform United States refugee law with the 1967 United Nations Protocol Relating to the Status of Refugees**. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-7...(1987).

Pet. App. 16a (emphasis added).

When the relevant guidelines are overlooked and/or misconstrued by the courts and administrative agencies as in the present case, informants like the Castillos and countless others who risk their lives out of a sense of moral outrage to fight drug traffickers are left to fend for themselves without protection from our asylum laws. This **misapplication or non-application of relevant guidelines** leading to the erroneous conclusion that informants against the Cali drug cartel do not constitute a "particular social group" because the group lacks social visibility and the members are too numerous, also **helps defeat an**

important political and foreign policy consideration.[1] As the Eleventh Circuit opined:

> However, we are dismayed that these petitioners, who risked their lives and the safety of their families to assist our nation's allies in the "war on drugs," have been ignored by our nation. We regret that Congress has not deemed it appropriate to craft some legislative relief for these individuals and those similarly situated. Perhaps the compelling facts in this case and its troublesome resolution might be the impetus for such relief.

Pet. App. 20a.

Congress has not ignored petitioners and others similarly situated. It is the Eleventh Circuit and the Board of Immigration Appeals that have ignored and/or overlooked and/or misconstrued the Immigration and Nationality Act, the United Nations Protocol Relating to the Status of Refugees and the U.N. Guidelines On International Protection to be used in defining "Membership of a Particular Social group".

The following guidelines of the UNHCR, among others, are on point and appear to have been overlooked and/or misconstrued by the Eleventh Circuit as well as the Board of Immigration Appeals:

> 7. The second approach examines whether or not a group shares a common characteristic which makes

---

1. See "The President; Notice of October 19, 2005 - Continuation of the National Emergency With Respect to Significant Narcotics Traffickers Centered in Colombia." 70 F.R. 61209 (Oct. 20, 2005).

them a cognizable group or sets them apart from society at large. This has been referred to as the 'social perception' approach.

* * * * *

11. * * * Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:

a particular social group is a group of persons who share a common characteristic other than the risk of being persecuted, ***or who are perceived as a group by society****. The characteristic will often be one which is innate, unchangeable,* ***or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.***

* * * * *

14. As noted above, a particular social group cannot be defined exclusively by the persecution, that members of the group suffer or by a common fear of being persecuted. Nonetheless, **persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society**.

* * * * *

18. **The size of the purported social group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2).**

Therefore, the Eleventh Circuit finding that the particular social group to which Petitioners belong is both not visible enough, and too numerous, is not reasonable and is at odds with controlling law, *i.e.*, the United Nations Guidelines on defining membership in a particular social group.

Furthermore, the "defining attribute" of the particular social group of noncriminal informants against the Cali drug cartel is the group members' **moral commitment to**

fight the illegal cartel, not, as the court of appeals held, "their persecution by the cartel". Pet. App. 19a.

The Eleventh Circuit has overlooked this characteristic which is fundamental to the group's identity and mistakenly defines their common attribute as their fear of persecution by the Cali cartel.

Resolution and clarification by this Court would further the Congressional goal of ensuring the United States refugee law is in conformity with the 1967 United Nations Protocol Relating to the Status of Refugees. *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 436.

The Solicitor General has recently expressed that "the interpretation of 'membership in a particular social group' [is] of considerable significance in the administration of the INA." *Gonzales v. Thomas*, No. 05-552 *petition for cert. filed* (U.S. Oct. 31, 2005).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

MICHAEL DEAN RAY
Counsel of Record
NEIL DWIGHT KOLNER
Liberty Building
124 South Miami Avenue
Miami, Florida 33130
(305) 377-9000

Counsel for Petitioners

NOVEMBER 2006

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED APRIL 20, 2006

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-14662

BIA Nos. A74-661-613 & A74-661-614

DIEGO F. CASTILLO-ARIAS, MARTHA L. RINCON-ESCOBAR, ANDRES F. CASTILLO-RINCON, DIEGO F. CASTILLO-RINCON,

Petitioners,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the Board of Immigration Appeals

(April 20, 2006)

Before BIRCH and MARCUS, Circuit Judges, and NANGLE*, District Judge.

BIRCH, Circuit Judge:

---

* Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

Appendix A

Previously, we remanded this case to the Board of Immigration Appeals ("BIA") to determine whether noncriminal informants working against the Cali drug cartel constitute a "particular social group" within the meaning of that phrase in the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.* The BIA concluded they did not. In this appeal, applying deferential review, we ask whether the BIA's interpretation of this statutory provision is reasonable. Concluding that it is, we DENY, with consternation, the petition for review of the BIA's order dismissing the appeal of Diego F. Castillo-Arias, Martha L. Rincon-Escobar, Andres F. Castillo-Rincon, and Diego F. Castillo-Rincon (collectively "Castillos") from the immigration judge's ("IJ's") order denying their application seeking asylum and withholding of deportation.

I. BACKGROUND

We incorporate the following facts and procedural history, which are not in dispute, from our previous decision in this case:

> Diego Castillo-Arias ("Castillo-Arias") was born and raised in Cali, Colombia, the headquarters of the infamous Cali drug cartel.[1] Joined by his wife, Martha Rincon-Escobar, and his two sons, Andres Castillo-Rincon and Diego

1 Our recitation of the facts is drawn from Castillo-Arias's testimony before the Immigration Judge. The court found Castillo-Arias to be a credible witness. On appeal, the Government does not challenge Castillo-Arias's credibility or his account of the facts. Therefore, the facts are undisputed.

Appendix A

Castillo-Rincon, Castillo-Arias operated a bakery in Cali and resided in the city until 1996. During that time, Castillo-Arias was an acquaintance of Arturo Davila, a former policeman in the Cali Police Department who, after being fired for corruption, became the chief of security for the Cali cartel. Castillo-Arias also happened to be a good friend of Vladimir Martinez Meza, who was responsible for investigating and prosecuting narcotics traffickers in Cali.

Between 1990 and 1994, Davila would visit Castillo-Arias's bakery on the weekends and chat openly and brazenly about his involvement with the Cali cartel. During these conversations, Davila would identify people, places and events related to the cartel's exportation of narcotics from Colombia to the United States and Europe. Castillo-Arias, as a civic-minded citizen of Cali, passed the information he learned from Davila along to Meza. He told Meza about Davila's statements that the cartel had declared war against the Colombian government and that the cartel would kill politicians who oppose it. Castillo-Arias also disclosed the extent, location and size of the assets of the Cali cartel, including banks, bank accounts, mansions, haciendas, and villas both within and outside Colombia.

Castillo-Arias's good deeds would not go unpunished. On May 15, 1995, as Castillo-Arias was watching his son Andres ride his bicycle in

the street, a car suddenly blocked their path and three men emerged armed with pistols and an automatic weapon. The men tried to force Castillo-Arias into the car, but he resisted and was pushed to the ground and beaten. His beating caused Andres to scream loudly, and one of the men pistol-whipped Andres in the face. Andres's scream and the accompanying commotion prompted people in the neighborhood to emerge from their homes, and the men fled in their car. As they departed, they told Castillo-Arias that things would only get worse for him and his family. Castillo-Arias *1192 then took his son to a clinic, where he needed reconstructive surgery to repair his mouth and jaw.

The Castillos went to Castillo-Arias's parents' home in the northern section of Cali for the rest of the month. Castillo-Arias attempted to rent his bakery while they were away, but his lessees were intimidated by individuals who would inquire about him, and on more than one occasion, a lessee was harmed after he refused to divulge information regarding Castillo-Arias's whereabouts. Although Castillo-Arias had never been involved in politics and had never testified against the cartel in a drug trial, Meza recommended that Castillo-Arias go into hiding and, ultimately, leave Colombia.[2] After Castillo-

2. Meza left Colombia for Spain, and it appears that Davila may have been murdered.

Appendix A

Arias made two trips to the United States in 1995, the Castillos entered the United States in February 1996 as B-2 visitors for pleasure with authorization to remain in the country until August 8, 1996.

. . . .

On December 10, 1996, in accordance with 8 U.S.C. § 1229(a)(1), the Immigration and Naturalization Service ("the INS") issued show cause orders to the Castillos, charging them under 8 U.S.C. § 1227(a)(1)(B) with having remained in the United States for a longer time than permitted. At the show cause hearing, the Castillos admitted the factual allegations in the show cause orders and conceded the charge of deportability. At that time, through counsel, they requested relief from deportation in the form of asylum, withholding of deportation, or at the very least, voluntary departure.[3]

Following a hearing on their requests for relief, [the IJ] denied the Castillos' applications for asylum and withholding of deportation. Initially, the IJ noted that an alien is eligible for asylum under 8 U.S.C. § 1158(b)(1) only if he or she is a "refugee," which is defined as an alien who is unable or unwilling to return to his or her

3. It also appears that Castillo-Arias, on behalf of his entire family, had filed an application for asylum with the INS before the show cause orders were issued.

country of origin because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). The IJ concluded that even if the Castillos have a fear of harm, that harm does not arise on account of race, religion, nationality, membership in a particular social group, or political opinion. Instead, the IJ concluded, the threat to the Castillos was based on "retaliation" or "retribution" due to Castillo-Arias's voluntary decision to be an informant against the cartel. (Admin Rec. at 103, 104). On this basis, the IJ denied the Castillos' applications for asylum. And because the Castillos failed to meet the lower burden of proof for establishing eligibility for asylum, the IJ denied withholding of deportation because they could not satisfy the higher burden of proof to qualify for such relief. *See* 8 U.S.C. § 1253(h)(1) (1994); *Al Najjar v. Ashcroft,* 257 F.3d 1262, 1303 (11th Cir.2001). The IJ granted the Castillos' requests for voluntary departure and entered an alternative order of deportation to Colombia.

The Castillos timely filed an appeal to [the BIA]. On appeal, Castillo-Arias and his family argued that they qualified as "refugees" under 8 U.S.C. § 1101(a)(42)(A) because they suffered a well-founded fear of persecution based on (1) a political opinion imputed to Castillo-Arias by the drug cartel and (2) his membership in a particular

> social group, namely, a group composed of non-criminal informants. The BIA rejected their first argument, holding that the people who threatened the Castillos did so "out of personal motives and not due to any political opinion imputed to [Castillo-Arias]." (Admin. Rec. at 9.) Although the BIA did not separately address their claim based on membership in a particular social group, the BIA ultimately concluded that the record contained insufficient evidence that there was any motivation other than revenge for the aid Castillo-Arias provided to the government, and wrote that "[w]e agree with the Immigration Judge's well-reasoned decision that the respondents have failed to adequately establish that they suffered past persecution or that they have a well-founded fear of persecution on account of a ground protected under the Immigration and Nationality Act." (*Id.* at 8-9.) As a result, the BIA affirmed the IJ's decision and dismissed the appeal.

Castillo-Arias v. U.S. Att'y Gen., 82 Fed.Appx. 221 (11th Cir.2003) (per curiam) (certain footnotes omitted or renumbered).

In that prior appeal, we held that the facts of the case were essentially undisputed, and the only issue was the application of the INA. *Castillo-Arias,* at 221. We affirmed the BIA's conclusion that Castillo-Arias was not persecuted on account of his political opinion. *Id.* at 221. However, we held that the BIA's conclusion that Castillo-Arias was targeted by the cartel solely out of revenge was not supported

by substantial evidence. *Id.* at 221. Though there was evidence of revenge, a reasonable factfinder would be compelled to conclude that Castillo-Arias produced evidence that the harm was motivated by his membership in a group composed of noncriminal informants. *Id.* at 221. We then remanded the case to the BIA to decide the sole issue here on appeal, i.e., if noncriminal informants constitute a "particular social group" within the meaning of the phrase in the INA, 8 U.S.C. § 1101(a)(42)(A). *Castillo-Arias,* at 221.

On remand, the BIA concluded that noncriminal informants did not constitute a "particular social group." The BIA relied on *Matter of Acosta,* 19 I. & N. Dec. 211, 233-34 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi,* 19 I. & N. Dec. 439, 447 (BIA 1987), as authority for the premise that a "'particular social group' " refers to persons who "'share a common, immutable characteristic.'" R1 at 54 (quoting *Matter of Acosta,* 19 I. & N. Dec. at 233). Reiterating *Acosta,* the BIA stated that members of a particular social group are those persons with a "'shared characteristic . . . such as sex, color, or kinship ties, or in some circumstances . . . a shared past experience such as former military leadership or land ownership.'" *Id.* (quoting *Matter of Acosta,* 19 I. & N. Dec. at 233). The BIA noted that this characteristic "'must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.'" *Id.* (quoting *Matter of Acosta,* 19 I. & N. Dec. at 233). It is only in these circumstances that membership in a "particular social group" becomes comparable to the other grounds listed in the statute. *Id.* While

reiterating its continued adherence to the *Acosta* formulation, the BIA's decision also referenced guidelines from the United Nations High Commissioner for Refugees ("UNHCR"), which define a particular social group as

> [a] group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.

Id. at 55 (citing UNHCR, *Guidelines on International Protection: "Membership of a particular social group" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees,* ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter "UNHCR Guidelines"]).

The BIA then considered whether Castillo-Arias's past acts were "the kind of shared past experience that constitutes membership in a particular social group." *Id.* at 57. In applying the *Acosta* formulation, the BIA listed two major considerations: (1) immutability and (2) social visibility. *Id.* at 57-59. In analyzing immutability, the BIA conceded that "[a] past experience is, by its very nature immutable, as it has already occurred and cannot be undone." *Id.* at 57. The BIA noted, however, that this fact "does not mean that any past experience that may be shared by others suffices to define a particular social group for asylum purposes." *Id.*

Appendix A

Analogizing noncriminal informants to occupations like the police or military, the BIA stated that "we do not afford protection based on social group membership to persons exposed to risks normally associated with employment in [such] occupations." *Id.* (citing *Matter of Fuentes,* 19 I. & N. Dec. 658 (BIA 1988)). While noting that a former member of the national police could conceivably demonstrate membership in a particular social group, the BIA cautioned that "if a former police officer were singled out for reprisal, not because of his status as a former police officer, but because of his role in disrupting particular criminal activity, he would not be considered, without more, to have been targeted as a member of a particular social group." *Id.* The BIA further concluded that those who accept such employment are aware of the risks involved in the disruption of criminal activity. *Id.* Similarly, the BIA noted that those who inform on criminal activity are also aware of similar dangers. It also dismissed the distinction between compensated informants and uncompensated, civic-minded informants as "not particularly helpful in addressing the question of who is deserving of protection under the asylum law." *Id.* at 57.

In analyzing social visibility, the BIA stressed that its "other decisions recognizing particular social groups involved characteristics which were highly visible and recognizable by others in the country in question." *Id.* at 58. The BIA noted that the two illustrations provided in *Acosta,* "'former military leadership and land ownership'—are also easily recognizable traits." *Id.* (quoting *Matter of Acosta,* 19 I. & N. Dec. at 234). Once again referencing the UNHCR Guidelines, the BIA stated that while " 'persecutory action

toward a group may be a relevant action in determining the *visibility* of a group in a particular society,'" the social group was not meant to be a catch-all and "'cannot be defined *exclusively* by the fact that it is targeted for persecution.'" *Id.* (quoting UNHCR Guidelines ¶¶ 2, 14 (emphases in original)).

With regard to confidential informants, the BIA noted that "the very nature of the conduct at issue is such that it is generally out of the public view," and it thereby concluded that informants lacked the necessary social visibility to be recognized as a "particular social group." *Id.* In ultimately denying Castillo-Arias's appeal and affirming the IJ's decision, the BIA raised additional concerns about the numerosity and inchoateness of informants and noted that the cartels have been known to target the population in general in order to intimidate potential witnesses and anyone perceived to have interfered with its operations. *Id.* at 59. The Castillos then timely appealed the BIA's decision.

II. DISCUSSION

A. *Standard of Review*

To the extent that the BIA's decision was based on a legal determination, review is *de novo*. *Mohammed v. Ashcroft,* 261 F.3d 1244, 1247-48 (11th Cir.2001). However, as we noted in our previous decision, "[*de novo*] review of the BIA's interpretation is informed by the principle of deference articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)." *Castillo-Arias,* at 221.

Appendix A

The Supreme Court has established a two-step process for reviewing an agency's interpretation of a statute which it administers. *Chevron,* 467 U.S. at 842-44, 104 S.Ct. at 2781-82. First, if congressional purpose is clear, courts and administrative agencies "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S.Ct. at 2781. A second level of review, however, is triggered when "the statute is silent or ambiguous with respect to the specific issue." *Id.* at 843, 104 S.Ct. at 2782. "In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844, 104 S.Ct. at 2782; *see also INS v. Aguirre-Aguirre,* 526 U.S. 415, 425, 119 S.Ct. 1439, 1445, 143 L.Ed.2d 590 (1999) ("[T]he BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." (quotations omitted)); *Mazariegos v. Office of U.S. Att'y Gen.,* 241 F.3d 1320, 1327 n. 4 (11th Cir.2001) ("The degree of deference is especially great in the field of immigration."). An agency's interpretation is deemed reasonable unless it is "arbitrary, capricious, or clearly contrary to law." *Alabama Power Co. v. Fed. Energy Regulatory Comm'n,* 22 F.3d 270, 272 (11th Cir.1994).

At issue in this case is the BIA's interpretation of the statutory phrase "particular social group." Under the INA, an alien who arrives in or is present in the United States may apply for asylum. 8 U.S.C. § 1158(a)(1). The BIA, through the Attorney General, has the discretion to grant asylum if the alien meets the INA's definition of a "refugee." *See id.* § 1158(b)(1)(A); *Al Najjar v. Ashcroft,* 257 F.3d 1262,

1284 (11th Cir.2001). In addition, the asylum applicant carries the burden of proving statutory "refugee" status. *Al Najjar,* 257 at 1284. In relevant part, a "refugee" is

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, *membership in a particular social group,* or political opinion.

8 U.S.C. § 1101(a)(42)(A) (emphasis added). With regard to withholding of deportation (now removal), the Attorney General may not deport an alien if his life or freedom would be threatened in that country because of "race, religion, nationality, *membership in a particular social group,* or political opinion." 8 U.S.C. § 1253(h)(1) (1994) (emphasis added) (now codified at 8 U.S.C. § 1231(b)(3)(A)).

Congress did not directly speak on the issue of what constitutes a "particular social group," one of the five listed categories that qualify for refugee status or withholding of deportation, within the meaning of the INA. *See* 8 U.S.C. § 1101(a)(42)(A); *id.* § 1253(h)(1) (1994) (now codified at 8 U.S.C. § 1231(b)(3)(A)). Accordingly, we must follow the BIA's determination that noncriminal informants working against the Cali cartel are not a social group under the INA

unless the interpretation is unreasonable, i.e., arbitrary, capricious, or clearly contrary to law. *See Alabama Power Co.*, 22 F.3d at 272.

B. *Whether the BIA's Interpretation Is Reasonable*

The Castillos argue that the BIA's interpretation of "particular social group," which excludes noncriminal informants working against the Cali drug cartel, was unreasonable. In so doing, they contend that other social groups that have qualified under the INA are neither more visible nor recognizable than noncriminal informants or former informants. They further assert that the BIA put forth contradictory rationales in concluding that noncriminal informants do not qualify as a particular social group. Additionally, they contend that Castillo-Arias's family members have suffered derivative persecution on the basis of his status as a noncriminal informant.

To date, we have not expressly reviewed, under *Chevron*, the BIA's legal definition of "particular social group." There are six circuits who have deferred to the *Acosta* formulation. *See Thomas v. Gonzales*, 409 F.3d 1177, 1184-87 (9th Cir.2005) (en banc); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir.2005); *Silva v. Ashcroft*, 394 F.3d 1, 5 (1st Cir.2005); *Castellano-Chacon v. INS*, 341 F.3d 533, 546-48 (6th Cir.2003); *Lwin v. INS*, 144 F.3d 505, 511-12 (7th Cir.1998); *Fatin v. INS*, 12 F.3d 1233, 1238-40 (3d Cir.1993). Two circuits, while not expressly deferring to the BIA's legal definition of "particular social group," have viewed *Acosta* favorably. *See Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir.2004) (citing the *Acosta* formulation in support of

including "family" within "particular social group"); *Ontunez-Tursios v. Ashcroft,* 303 F.3d 341, 352 (5th Cir.2002) (citing to *Acosta* and restating the *Acosta* formulation). Two other circuits, however, may differ in some respects with the general definition as stated in *Acosta. See Safaie v. INS,* 25 F.3d 636, 640 (8th Cir.1994) (noting that the "principal concern [regarding a 'particular social group'] is a 'voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group'" (citation omitted)), *superceded by statute on other grounds recognized by Rife v. Ashcroft,* 374 F.3d 606, 614 (8th Cir.2004); *Gomez v. INS,* 947 F.2d 660, 664 (2d Cir.1991) (defining "a particular social group" as "comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor-or in the eyes of the outside world in general").

As an initial matter, we join our sister circuits who have deferred to the BIA's *Acosta* formulation of "particular social group." The expertise necessary to craft this definition is well within the BIA's bailiwick and is neither arbitrary, capricious, nor clearly contrary to law. *See Alabama Power Co.,* 22 F.3d at 272. We do not doubt the reasonableness of the BIA's requirement of a "common, immutable characteristic . . . [that] is fundamental to [its members'] individual identities or consciences," which is consonant with the purposes that underlie the other four grounds for refugee status or withholding of deportation under the INA. *See Matter of Acosta,* 19 I. & N. Dec. at 233-34. Furthermore, *Acosta* strikes an acceptable balance between (1) rendering "particular social group" a catch-all for all groups who might

claim persecution, which would render the other four categories meaningless, and (2) rendering "particular social group" a nullity by making its requirements too stringent or too specific. Reference to the UNHCR Guidelines by the BIA in elucidating the *Acosta* formulation is permissible because the U.S. Supreme Court has held that Congress intended to conform United States refugee law with the 1967 United Nations Protocol Relating to the Status of Refugees. *See INS v. Cardoza-Fonseca,* 480 U.S. 421, 436-37, 107 S.Ct. 1207, 1215-16, 94 L.Ed.2d 434 (1987); *see also Castellano-Chacon,* 341 F.3d at 546-48 (noting that "[t]he UNHCR takes the Second Circuit's approach, in that the external perception of the group can be considered as an additional factor" and that "[a]s the BIA continues to revise and evaluate its own definition of a particular social group, our definition may evolve in the same way as the BIA's, with the caveat that the BIA must continue to make a reasonable interpretation").

We also apply *Chevron* deference to the BIA's further articulation of the *Acosta* formulation with regard to the eligibility of noncriminal informants who work against the Cali cartel. *See Aguirre-Aguirre,* 526 U.S. at 425, 119 S.Ct. at 1445; *Cardoza-Fonseca,* 480 U.S. at 448, 107 S.Ct. at 1221 ("In [the] process of filling *any gap left,* implicitly or explicitly, by Congress, the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program." (quotations omitted) (emphasis added)). In so doing, we conclude that the BIA's legal determination that noncriminal informants do not fall within the *Acosta* formulation is also reasonable.

Here, the BIA noted that Castillo-Arias's activity as an informant is an historic fact which is immutable, but is not necessarily an experience shared by others that is sufficient to define a social group for asylum purposes. R1 at 57. Narcotics traffickers, such as the cartel, threaten "anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises." *Id.* at 59. For this reason, informants against the cartel often intend to remain undiscovered. *Id.* at 58. Generally, those informants who remain anonymous are not visible enough to be considered a "particular social group," as the very nature of the activity prevents them from being recognized by society at large.

Thus, the social visibility of informants is different in kind from the particular social groups that have been afforded protection under the INA. *See, e.g., Matter of V-T-S-*, 21 I. & N. Dec. 792, 798 (BIA 1997) (Filipinos of mixed Filipino-Chinese ancestry); *Matter of Kasinga,* 21 I. & N. Dec. 357, 365-66 (BIA 1996) (young women of a particular tribe who were opposed to female genital mutilation); *Matter of Toboso-Alfonso,* 20 I. & N. Dec. 819, 822-23 (BIA 1990) (persons listed by the government as having the status of homosexual); *Matter of Fuentes,* 19 I. & N. Dec. at 662 (former members of the national police); *Matter of Acosta,* 19 I. & N. Dec. at 234 (former military leadership and land ownership). Insofar as informants share some characteristics with former members of the national police, they are nonetheless distinguishable. First, the BIA emphasized that it did not afford protection to "persons exposed to risks normally associated with employment in occupations such as the police or military." R1 at 57. Second, even if former

members of the national*1198 police were targeted based on their status as former police officers, the decision to afford protection under the INA is situationally dependent. *See* R1 at 57 ("[A] former police officer could *conceivably* demonstrate persecution based on membership in a particular social group.") (emphasis added).

In *Matter of Fuentes,* the BIA noted that mistreatment occurring because of the status of being a former member of the national police " *in appropriate circumstances*" could be found to be persecution on account of membership in a particular social group. 19 I & N Dec. at 662 (emphasis added). The only example provided in *Fuentes* as an appropriate circumstance was when the former police officers would be targeted based on their status after "hostilities have ceased." *See id.* In this case, there is no evidence that the Cali cartel has ceased its hostilities. Furthermore, there is nothing in the record that would compel us to conclude that noncriminal informants working against the Cali cartel warrant an exception to the general rule that those who engage in risks similar to those of the police or military, regardless of motive, do not receive protection as a particular social group under the INA.

To the extent that there are noncriminal informants that do not keep their activities secret, the BIA reasonably concluded that they still do not constitute a "particular social group" under the INA because there is no evidence that the cartel would treat them any differently from any other person the cartel perceived to have interfered with its activities. The risk of persecution alone does not create a particular social group within the meaning of the INA, as virtually the entire

population of Colombia is a potential subject of persecution by the cartel. *See* R1 at 59. While they may be recognizable after their activities have been disclosed to the cartel or to society, their defining attribute is their persecution by the cartel. As stated previously, "particular social group" should not be a "catch all" for all persons alleging persecution who do not fit elsewhere. In restricting the grounds for asylum and withholding of deportation based on persecution to five enumerated grounds, Congress could not have intended that all individuals seeking this relief would qualify in some form by defining their own "particular social group." *See* 8 U.S.C. § 1101(a)(42)(A); *id.* § 1253(h)(1) (1994) (now codified at 8 U.S.C. § 1231(b)(3)(A)). Accordingly, the BIA's conclusion that noncriminal informants were not visible enough to be considered a social group was reasonable.

We now turn to the BIA's additional concerns regarding the numerosity and inchoateness of noncriminal informants. We believe that these concerns are valid. *See Ochoa v. Gonzales,* 406 F.3d 1166, 1171 (9th Cir.2005) (holding that Colombian business owners who rejected demands from narcotics traffickers are "too broad to qualify as a particularized social group" because "[t]here is no unifying relationship or characteristic to narrow this diverse and disconnected group"). Moreover, despite the Castillos's assertions, there is nothing contradictory in concluding that a group of informants are, for purposes of the INA, both not visible enough, and, at the same time, potentially too numerous or inchoate. The fact that a characteristic or association is shared by a large number of people does not mean that either society at large, let alone other members within that same group, will recognize that characteristic or

association. This is especially so when the characteristic or association is inherently secretive. Because we conclude that the BIA's interpretation of the INA is reasonable with regard to noncriminal informants, we need not determine whether Castillo-Arias's family has suffered derivative persecution on that basis.

As we are required to do, we have given the requisite deference to the BIA's interpretation of the INA. However, we are dismayed that these petitioners, who risked their lives and the safety of their families to assist our nation's allies in the "war on drugs," have been ignored by our nation. We regret that Congress has not deemed it appropriate to craft some legislative relief for these individuals and those similarly situated. Perhaps the compelling facts in this case and its troublesome resolution might be the impetus for such relief.

III. CONCLUSION

Having previously concluded that the Castillos's eligibility for asylum and withholding of deportation turned upon whether noncriminal informants working against the Cali cartel constitute a "particular social group" within the meaning of the INA, we remanded this action to the BIA. On remand from our court, the BIA concluded that noncriminal informants do not constitute a "particular social group" under the INA. Back on appeal, we conclude that the BIA's interpretation of the INA was reasonable. Notwithstanding their very sympathetic personal circumstances, the Castillos are ineligible for asylum or withholding of deportation. **PETITION DENIED.**

APPENDIX B — DECISION AND ORDER OF THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW DATED AUGUST 13, 2004

File: A74-661-613 - Miami
A74-661-614
A74-661-615
A74-661-616

In re: DIEGO F. *CASTILLO-ARIAS*
MARTHA L. *RINCON-ESCOBAR*
ANDRES F. *CASTILLO-RINCON*
DIEGO F. *CASTILLO-RINCON*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Michael D. Ray, Esq.

ON BEHALF OF DHS: Maria M. Lopez-Enriquez
Assistant Chief Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - In the United States in violation of law

APPLICATION: Asylum and withholding of deportation

The respondents, a married couple and their two minor children, are natives and citizens of Colombia. In their deportation proceedings, the lead respondent, Castillo-Arias,

requested asylum and withholding of deportation claiming fear of persecution in Colombia on account of an imputed political opinion and membership in a particular social group. On July 31,1997, an Immigration Judge denied their claims for relief and granted voluntary departure. On March 20, 2002, the Board affirmed the Immigration Judge's decision.

On appeal, the Eleventh Circuit Court of Appeals determined that the lead respondent was threatened with harm on account of membership in a group composed of non-criminal informants. *Castillo-Arias v. Ashcroft*, No. 01-12125 (11th Circuit, August 25, 2003) (unpublished). The court has remanded the case to the Board to decide in the first instance whether non-criminal informants are a "particular social group" as that term is used in the definition of refugee in the Immigration and Nationality Act (INA). As discussed below, we find that the group of non-criminal informants is not a "particular social group."

I. BACKGROUND

A. Facts.

The lead respondent [hereinafter respondent] provided the following account of events related to his claim for asylum. He testified that he was born and raised in Cali, Colombia, the headquarters of the Cali drug cartel. He lived with his wife and two children in Cali where he operated a bakery from 1990 to some time in 1995. During this time, he was an acquaintance of Arturo Davila, a former policeman in the Cali Police Department who, after being fired for corruption, became the chief of security for the Cali cartel.

Appendix B

The respondent was also a good friend of Vladimir Martinez Meza, the General Counsel for the city of Cali, who was responsible for investigating and prosecuting drug traffickers in Cali.

Between 1990 and 1994, Davila would visit the respondent's bakery on weekends and talk openly about his involvement with the Cali cartel. Davila identified people, places and events related to the cartel's exportation of narcotics from Colombia to the United States and Europe. Davila also informed the respondent of his close ties with the Rodriguez brothers and others involved in running the Cali drug cartel. The respondent passed the information he learned from Davila along to Meza. He told Meza about Davila's statements that the Cali cartel had declared war against the government of Colombia and that they would kill politicians who opposed the cartel. He also told Meza what he had learned from Davila about the location and size of Cali cartel assets, including banks, bank accounts, mansions, haciendas, villas, and other assets both within and outside of Colombia.

On May 15, 1995, the respondent was with his son Andre, who was riding a bicycle, when a car suddenly blocked their path. Three men with pistols and an automatic weapon attempted to force the respondent into the car. When he resisted he was forced to the ground and beaten. The respondent's son screamed and one of the men hit him in the face with a pistol. The commotion brought people in the neighborhood out of their houses and the men fled in their car. As they departed, they warned the respondent that things would get worse for him and his family and that they would

also get Meza. The respondent took his son to a clinic where he underwent reconstructive surgery to repair his mouth and jaw.

After this attack, the respondents went to the lead respondent's parents' home in the northern section of Cali for the remainder of the month of May 1995. The respondent attempted to rent his bakery while he was away but the lessees were intimidated and some lessees were harmed for failing to disclose the whereabouts of the respondent. Meza advised the respondent to go into hiding and eventually to leave Colombia. The respondent's parents relocated in Cali in attempts to evade persons looking for their son. After the respondent made two trips to the United States in 1995, the respondents entered the United States in February 1996 as visitors for pleasure with authorization to remain until August 8,1996.

The respondent last spoke to Davila in early 1995, and has heard unconfirmed reports that Davila may have been killed. The Rodriguez brothers, leaders of the Cali cartel, were prosecuted and served time in prison. The respondent did not appear as a witness in the criminal proceedings against members of the Cali cartel. Meza left Colombia for Spain after attempts against his life by the Cali cartel. In April 1997, the respondent's parents and two sisters left Colombia for Germany.

B. The Immigration Judge's Decision.

The Immigration Judge found the respondent's testimony credible, but found that he had failed to establish either past persecution or a well-founded fear of persecution on account

of a protected ground under the Act. The Immigration Judge reasoned that the assault and threats against the lead respondent were based on retaliation or retribution because of his voluntary decision to provide information to the government concerning the operations of the Cali cartel. Finding a lack of required nexus, the immigration Judge denied the application for asylum and withholding of deportation.

C. The Board's Decision.

On appeal to the Board, the respondent argued that he had suffered past persecution and had a well-founded fear of persecution based on (I) a political opinion imputed by the drug cartel and (2) membership in a particular social group composed of non-criminal informants who had informed against the Cali drug cartel. The Board rejected the first argument, holding that the people who threatened the respondent did so "out of personal motives and not due to any political opinion imputed to [Castillo-Arias]."

The Board did not separately address the claim based on membership in a particular social group, but stated that it agreed with the Immigration Judge "that the record contains insufficient evidence that there was any motivation behind the actions of the cartel members against the respondent, other than revenge for the aid he provided to the government." The Board therefore affirmed the Immigration Judge's decision and dismissed the appeal.[1]

1. With his appeal brief the respondent submitted documents marked Exhibits A and B in support of his argument that internal

(Cont'd)

Appendix B

D. The Eleventh Circuit's Decision.

The Eleventh Circuit found that the evidence of record supported the Board's conclusion that the threats to the respondent were not on account of his political opinion or imputed political opinion. The court found, however, that it was unable to determine on the record before it whether the respondent had been targeted because of his membership in a particular social group.

In addressing the particular social group issue, the court found that "[t]he BIA implicitly acknowledged two possible bases for the action of the cartel members: retribution, and Castillo-Arias's status as an informant." Eleventh Circuit Decision at 12. The court found that the Board erred in concluding, based on the evidence in the record, that the sole motive for the actions against the respondent was revenge for the aid he provided to the government. *Id.* at 12-13. The court stated that "[a]lthough there certainly is evidence to support the BIA's conclusion that revenge was a motive in the action of cartel members, a reasonable fact-finder would

---

(Cont'd)

relocation was not an option. The Exhibit A documents concerned the respondent's brother-in-law, a civic leader who worked against the Cali cartel and who was shot in November 1998 after returning from a government meeting. The Exhibit B document concerned threats to the surviving spouse of the respondent's brother-in-law. We did not reach the issue of internal relocation in our prior decision and therefore did not address the additional evidence submitted with the appeal. Nor do we now find that the information contained in these Exhibits would affect the resolution of the particular social group issue which we have been directed to address on remand.

be compelled to conclude that Castillo-Arias has produced evidence from which it is reasonable to believe that the harm was motivated by his membership in a group composed of non-criminal informants." *Id.* at 13.

Having found that the respondents were targeted because of their membership in a group composed of non-criminal informants, the court reversed the Board's finding that the sole motive for harming the respondents was retaliation or retribution. Because the Board had not addressed whether non-criminal informants constitute a "particular social group" within the meaning of the INA, the court has now remanded that question for our consideration.

II. ANALYSIS

A. The *Matter of Acosta* formulation.

The starting point in defining the phrase "particular social group" is set forth in *Matter of Acosta*, 19 I&N Dec. 211 at 233-34 (BIA 1985). There we explained that "persecution on account of membership in a particular social group" refers to

> persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group

> characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of membership become something comparable to the other four grounds of persecution under the Act, namely, something that is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed. By construing "persecution on account of membership in a particular social group" in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

Under the standard established in *Matter of Acosta*, we have recognized "particular social groups" in a number of cases. *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997) (Filipinos of mixed Filipino-Chinese ancestry); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (young women of the Tchamba-Kunsuntu tribe of northern Togo who did not undergo female genital mutilation as practiced by that tribe and who opposed the practice); *Matter of H-*, 21 I&N Dec. 337 (BIA 1996) (members of the Marehan subclan of Somalia who share ties of kinship and linguistic commonalities); *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990)

(persons identified as homosexuals by the Cuban government); *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988) (former members of the national police of El Salvador).

The First, Third, Sixth and Seventh Circuits have adopted the Board's *Acosta* formulation. *See Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (11th Cir. 1985) (applying *Acosta* in determining that family relations can be the basis of a particular social group); *Fatin v. INS*, 12 F.3d 1233, 1239-41 (3d Cir. 1993) (subgroup of Iranian feminists who refuse to conform to the government's gender-specific laws and social norms may constitute a particular social group); *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003) (applying *Acosta* to find that "tattooed youth" were not a "particular social group"); *Lwin v. INS*, 144 F.3d 505 (7th Cir. 1998) (parents of Burmese student dissidents shared a common, immutable characteristic sufficient to comprise a particular social group).

The Ninth Circuit initially defined "particular social group" to require a "voluntary associational relationship," described as a "collection of people closely affiliated with each other, who are actuated by some common impulse or interest" *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986). In a recent decision, however, the Ninth Circuit has recognized that groups sharing immutable characteristics, such as a familial relationship or sexual identity, could also be considered social groups within the meaning of the refugee definition. *Hernandez-Montiel v. INS*, 225 F.3d 1084,1093 (9th Cir. 2000) (holding that a "'particular social group' is one united by a voluntary association, including a former association, or by an innate characteristic

that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.").

The Second Circuit follows the Ninth Circuit's "voluntary associational relationship" standard, but also requires that the members of a social group must be externally distinguishable. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991), explaining that, "[l]ike the traits which distinguish the other four enumerated categories — race, religion, nationality and political opinion — the attributes of a particular social group must be recognizable and discrete."

The UNHCR has recently adopted guidelines which combine elements of the *Acosta* immutable or fundamental characteristic approach as well as the Second Circuit's "social perception" approach. The UNIICR Guidelines define a particular social group as

> A group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.

See Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Refugee Agency, U.N. Doc. HCR/GIP/02/02 (2002) at paragraph 11.

Appendix B

Having reviewed the range of approaches to defining particular social group, we continue to adhere to the *Acosta* formulation. Under Acosta, we do not require a "voluntary associational relationship" among group members. Nor do we require an element of "cohesiveness" or homogeneity among group members. As discussed below, we have considered as a relevant factor the extent to which members of society perceive those with the characteristic in question as members of a social group.

B. Applying the *Acosta* formulation to the respondent's social group claim.

The Eleventh Circuit has directed us to consider whether 'non-criminal informants" are a particular social group in the context of this case. We find that this group is too loosely defined to meet the requirement of particularity. The group of "non-criminal informants" could potentially include persons who passed along information concerning any of the numerous guerrilla factions or narco-trafficking cartels currently active in Colombia to the government or to a competing faction or cartel. In considering whether informants are a particular social group, it is important to know to whom and from whom the information is being provided, as well as the nature of the information passed along.

Although "non-criminal informants" do not constitute a particular social group, the respondent, in his initial appeal to the Board, referred to a subgroup of "former non-criminal government informants working against the Cali drug cartel." Respondent's Brief, at 12. On remand, the respondent also

refers to "noncriminal drug informants working against the Cali drug cartel." Brief on Remand, at 5. We understand the Eleventh Circuit's directive on remand to require consideration of these potentially narrower formulations of the particular social group within the larger group of non-criminal informants. We therefore examine whether "non-criminal drug informants working against the Cali drug cartel" constitute a particular social group.

Neither the statute, regulations, or case law provide a definitive answer to this question. The DHS refers in its Brief on Remand to a Tenth Circuit decision rejecting a social group claim based on alleged membership in a social group consisting of "persons who have worked as informants for drug enforcement agencies of the United States and who are in danger of being retaliated against upon return to [Mexico]" as "not supported by case law" or "by the principles underlying the Act." *United States v. Aranda-Hernandez*, 95 F.3d 977, 980, 981 (10th Cir. 1996). The Tenth Circuit decision, however, mentions the social group argument only in passing and sheds little light on the resolution of the issue in this case.[2]

Courts have recognized that informants in some situations may be able to demonstrate persecution on account

---

[2]. The issue in *Aranda-Hernandez* was whether the respondent had been prejudiced by the Immigration Judge's rejection of his asylum claim. The Immigration Judge had rejected the claim on the merits but had also found that the respondent was ineligible because of aggravated felony drug convictions. It is not clear from the decision the extent to which Aranda's social group argument may have been affected by his own involvement in drug transactions.

of political opinion. *See, e.g., Briones v. INS*, 175 F.3d 727 (9th Cir. 1999) (death threats by rebel *group* against confidential informer working for government were on account of political opinion). *Compare Adhiyippa v. INS*, 58 F.3d 261 (6th Cir. 1995) (evidence supported Board's conclusion that threats by terrorists were on account of status as a government informant rather than based on political opinion). *See also, Grava v. INS*, 205 F.3d 1177 (9th Cir. 2000) (threats against whistleblower who reported corrupt behavior of government officials might be on account of political opinion). As far as we have found, no court has held that government informants against a criminal enterprise such as a drug cartel constitute a particular social group. We therefore examine, as a matter of first impression, whether the respondent's past acts — passing along information concerning the Cali cartel to the government — is the kind of shared past experience that constitutes membership in a particular social group.

1. Immutability based on past experiences.

The respondent asserts that the historical fact of having informed on the Cali cartel is an immutable characteristic within the meaning *of Acosta.* A past experience is, by its very nature immutable, as it has already occurred and cannot be undone. However, that does not mean that any past experience that may be shared by others suffices to define a particular social group for asylum purposes. For example, we do not afford protection based on social group membership to persons exposed to risks normally associated with employment in occupations such as the police or the military. *Matter of Fuentes, supra.* In part, this is because

persons accepting such employment are aware of the risks involved and undertake the risks in return for compensation. Similarly, a person who agrees to work as a government informant in return for compensation takes a calculated risk and is not in a position to claim refugee status should such risks materialize.

In *Matter of Fuentes* we stated that, although a former member of the national police in El Salvador could not demonstrate persecution as a member of a social group based on attacks by guerrillas while performing his official duties as a police officer, his status as a former member of the national police was "an immutable characteristic, as it is one beyond the capacity of the respondent to change." *Id.* at 662. Were a situation to develop in which former police officers were targeted for persecution because of the fact of having served as police officers, a former police officer could conceivably demonstrate persecution based upon membership in a particular social group of former police officers. On the other hand, if a former police officer were singled out for reprisal, not because of his status as a former police officer, but because of his role in disrupting particular criminal activity, he would not be considered, without more, to have been targeted as a member of a particular social group.

The respondent emphasizes in his Brief on Remand that he informed on the Cali cartel, not for compensation or other *quid pro quo*, but out of a sense of civic duty and moral responsibility. The question in this case becomes whether the respondent's civic motives for working as a government informant distinguish his situation from that of informants employed by the government. We find that the fact that the

respondent acted out of a sense of civic responsibility does not suffice to define a subgroup of uncompensated informants who would be considered to constitute a particular social group. Some persons employed as informants or otherwise receiving compensation as informants, including police officers, also act partly out of a sense of civic responsibility. Many such informants could plausibly claim that their primary motivation was a sense of civic duty and the compensation alone would not have provided sufficient incentive to undertake the risks involved. Therefore, the distinction between informants who are compensated and those who act out of civic motives is not particularly helpful in addressing the question of who is deserving of protection under the asylum law.

2. Visibility.

Our decisions involving social groups have considered the recognizability, i.e., the social visibility, of the group in question. Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups. In considering clan membership *in Matter of H-*, *supra*, we did not rule categorically that membership in any clan would suffice. Rather, before concluding that membership in the the Marehan subclan in Somalia constituted membership in a particular social group, we examined the extent to which members of the purported group would be recognizable to others in Somalia. We found evidence in the record of "the presence of distinct and recognizable clans and subclans in Somalia." *Id.* at 342. Significantly, we found that the various clans could be differentiated based on linguistic

commonalities as well as kinship ties. We noted that the Service's Basic Law Manual also recognized that "clan membership is a highly recognizable, immutable characteristic that is acquired at birth and is inextricably linked to family ties." *Id.*

Our other decisions recognizing particular social groups involved characteristics which were highly visible and recognizable by others in the country in question. *See, e.g.* , former members of the national police, *Matter of Fuentes, supra;* young women of a particular tribe who were opposed to female genital mutilation, *Matter of Kasinga, supra*; Filipinos of mixed Filipino-Chinese ancestry, *Matter of V-T-S- supra;* persons listed by the government as having status of homosexual, *Matter of Toboso-Alfonso, supra.* The two illustrations of past experiences which might suffice for social group membership provided in *Matter of Acosta* — "former military leadership or land ownership" — are also easily recognizable traits. *Id* at 234.

Recent Guidelines issued by the United Nations confirm that "visibility" is an important element in identifying the existence of a particular social group. The Guidelines explain that the social group category was not meant to be a "catch all" applicable to all persons fearing persecution. Paragraph 2 of UNHCR Guidelines. In this regard, the Guidelines state that "a social group cannot be defined *exclusively* by the fact that it is targeted for persecution." *Id.* at paragraph 2 (emphasis in original). However, "persecutory action toward a group may be a relevant factor in determining the *visibility* of a group in a particular society." *Id.* at paragraph 14, emphasis added.

Appendix B

When considering the visibility of groups of confidential informants, the very nature of the conduct at issue is such that it is generally out of the public view. In the normal course of events an informant against the Cali cartel intends to remain unknown and undiscovered. Recognizability or visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members.

The respondent's reliance on the distinction between informants who act out of a sense of civic responsibility rather than for compensation to limit the membership in the relevant social group, would also tie group membership to a factor not "visible" to the Cali cartel or to other members of society. Notably, there has been no showing that whether an informant was compensated is of any relevance to the Cali cartel. Nor would members of society, in general, recognize a social group based on informants who act out of a sense of civic duty rather than for compensation.

The record in this case indicates that the Cali cartel and other drug cartels direct harm against anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises. In this sense, informants are not in a substantially different situation than anyone who has crossed the Cali cartel or who is perceived to be a threat to the cartel's interests. In fact, the State Department Country Reports indicate that "[n]arcotics traffickers frequently resorted to terror in attempts to intimidate the Government and *the general population*." 1993 Country Reports, at 393 (emphasis added). The victims of the narcotics traffickers included "politicians, labor organizers, human rights

monitors, and — overwhelmingly — peasant farmers." 1994 Country Reports, at 350; 1995 Country Reports, at 362. While these respondents present very sympathetic personal circumstances, it is difficult to conclude that any "group," as actually perceived by the cartel, is much narrower than the general population of Colombia.

Given the voluntary nature of the decision to serve as a government informant, the lack of social visibility of the members of the purported social group, and the indications in the record that the Cali cartel retaliates against anyone perceived to have interfered with its operations, we find that the respondent has not demonstrated membership in a particular social group.

III. CONCLUSION

For the reasons stated above, we conclude that the lead respondent has not demonstrated that he was persecuted based on membership in a particular social group within the meaning of the "refugee" definition. We therefore dismiss the respondents' appeal.

ORDER: The Immigration Judge's decision is affirmed and the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1997), the respondents are permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension

beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondents shall be deported as provided in the Immigration Judge's order.

s/ [illegible]
FOR THE BOARD

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 25, 2003

IN THE UNITED STATES COURT OF FOR THE ELEVENTH CIRCUIT

No. 02-12125

BIA No. A74-661-613

DIEGO F. CASTILLO-ARIAS,
MARTHA L. RINCON-ESCOBAR, et al.,

Petitioners-Appellants,

versus

U.S. ATTORNEY GENERAL, John Ashcroft,
IMMIGRATION AND NATURALIZATION SERVICE,

Respondents-Appellees.

Petition for Review of an Order of the
Board of Immigration Appeals

(August 25, 2003)

Before ANDERSON, COX and MAGILL*, Circuit Judges.

---

* Honorable Frank J. Magill, United States Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix C

PER CURIAM:

This is a petition for review of a decision rendered by the Board of Immigration Appeals. The petitioners, Diego Castillo-Arias and his family, are Colombian citizens who sought asylum and withholding of deportation on the grounds that they have a well-founded fear of future persecution in Colombia on account of a political opinion imputed to Castillo-Arias and on account of Castillo-Arias's membership in a particular social group. The BIA denied their requests for relief. For the reasons set forth below, we affirm the BIA's decision in part, we vacate the BIA's decision in part, and we remand for further proceedings.

I. BACKGROUND

Diego Castillo-Arias ("Castillo-Arias") was born and raised in Cali, Colombia, the headquarters of the infamous Cali drug cartel.[1] Joined by his wife, Martha Rincon-Escobar, and his two sons, Andres Castillo-Rincon and Diego Castillo-Rincon, Castillo-Arias operated a bakery in Cali and resided in the city until 1996. During that time, Castillo-Arias was an acquaintance of Arturo Davila, a former policeman in the Cali Police Department who, after being fired for corruption, became the chief of security for the Cali cartel. Castillo-Arias also happened to be a good friend of Vladimir Martinez Meza, who was responsible for investigating and prosecuting narcotics traffickers in Cali.

1. Our recitation of the facts is drawn from Castillo-Arias's testimony before the Immigration Judge. The court found Castillo-Arias to be a credible witness. On appeal, the Government does not challenge Castillo-Arias's credibility or his account of the facts. Therefore, the facts are undisputed.

Appendix C

Between 1990 and 1994, Davila would visit Castillo-Arias's bakery on the weekends and chat openly and brazenly about his involvement with the Cali cartel. During these conversations, Davila would identify people, places and events related to the cartel's exportation of narcotics from Colombia to the United States and Europe. Castillo-Arias, as a civic-minded citizen of Cali, passed the information he learned from Davila along to Meza. He told Meza about Davila's statements that the cartel had declared war against the Colombian government and that the cartel would kill politicians who oppose it. Castillo-Arias also disclosed the extent, location and size of the assets of the Cali cartel, including banks, bank accounts, mansions, haciendas, and villas both within and outside Colombia.

Castillo-Arias's good deeds would not go unpunished. On May 15, 1995, as Castillo-Arias was watching his son Andres ride his bicycle in the street, a car suddenly blocked their path and three men emerged armed with pistols and an automatic weapon. The men tried to force Castillo-Arias into the car, but he resisted and was pushed to the ground and beaten. His beating caused Andres to scream loudly, and one of the men pistol-whipped Andres in the face. Andres's scream and the accompanying commotion prompted people in the neighborhood to emerge from their homes, and the men fled in their car. As they departed, they told Castillo-Arias that things would only get worse for him and his family. Castillo-Arias then took his son to a clinic, where he needed reconstructive surgery to repair his mouth and jaw.

Appendix C

The Castillos[2] went to Castillo-Arias's parents' home in the northern section of Call for the rest of the month. Castillo-Arias attempted to rent his bakery while they were away, but his lessees were intimidated by individuals who would inquire about him, and on more than one occasion, a lessee was harmed after he refused to divulge information regarding Castillo-Arias's whereabouts. Although Castillo-Arias had never been involved in politics and had never testified against the cartel in a drug trial, Meza recommended that Castillo-Arias go into hiding and, ultimately, leave Colombia.[3] After Castillo-Arias made two trips to the United States in 1995, the Castillos entered the United States in February 1996 as B-2 visitors for pleasure with authorization to remain in the country until August 8, 1996.

II. PROCEDURAL HISTORY

On December 10, 1996, in accordance with 8 U.S.C. § 1229(a)(1), the Immigration and Naturalization Service ("the INS") issued show cause orders to the Castillos, charging them under 8 U.S.C. § 1227(a)(1)(B) with having remained in the United States for a longer time than permitted. At the show cause hearing, the Castillos admitted the factual allegations in the show cause orders and conceded the charge of deportability. At that time, through counsel, they requested relief from deportation in the form of asylum,

---

2. For simplicity, Castillo-Arias, his wife, and their two sons will be referred to collectively as "the Castillos."

3. Meza left Colombia for Spain, and it appears that Davila may have been murdered.

withholding of deportation, or at the very least, voluntary departure.[4]

Following a hearing on their requests for relief, the immigration judge ("the IJ") denied the Castillos' applications for asylum and withholding of deportation. Initially, the IJ noted that an alien is eligible for asylum under 8 U.S.C. § 1158(b)(1) only if he or she is a "refugee," which is defined as an alien who is unable or unwilling to return to his or her country of origin because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). The IJ concluded that even if the Castillos have a fear of harm, that harm does not arise on account of race, religion, nationality, membership in a particular social group, or political opinion. Instead, the IJ concluded, the threat to the Castillos was based on "retaliation" or "retribution" due to Castillo-Arias's voluntary decision to be an informant against the cartel. (Admin. Rec. at 103, 104.) On this basis, the IJ denied the Castillos' applications for asylum. And because the Castillos failed to meet the lower burden of proof for establishing eligibility for asylum, the IJ denied withholding of deportation because they could not satisfy the higher burden of proof to qualify for such relief. *See* 8 U.S.C. § 1253(h)(1) (1994); *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1303 (11th Cir. 2001). The IJ granted the Castillos' requests for voluntary departure and entered an alternative order of deportation to Colombia.

---

4. It also appears that Castillo-Arias, on behalf of his entire family, had filed an application for asylum with the INS before the show cause orders were issued.

Appendix C

The Castillos timely filed an appeal to the Board of Immigration Appeals ("the BIA"). On appeal, Castillo-Arias and his family argued that they qualified as "refugees" under 8 U.S.C. § 1101(a)(42)(A) because they suffered a well-founded fear of persecution based on (1) a political opinion imputed to Castillo-Arias by the drug cartel and (2) his membership in a particular social group, namely, a group composed of non-criminal informants. The BIA rejected their first argument, holding that the people who threatened the Castillos did so "out of personal motives and not due to any political opinion imputed to [Castillo-Arias]." (Admin. Rec. at 9.) Although the BIA did not separately address their claim based on membership in a particular social group, the BIA ultimately concluded that the record contained insufficient evidence that there was any motivation other than revenge for the aid Castillo-Arias provided to the government, and wrote that "[w]e agree with the Immigration Judge's well-reasoned decision that the respondents have failed to adequately establish that they suffered past persecution or that they have a well-founded fear of persecution on account of a ground protected under the Immigration and Nationality Act." (*Id.* at 8-9.) As a result, the BIA affirmed the IJ's decision and dismissed the appeal. The Castillos appeal.

III. DISCUSSION

The facts of this case essentially are undisputed. The Government, the IJ, and the BIA accept Castillo-Arias's account of the circumstances that his family has faced in Colombia. The only question in this case revolves around the application of the law to the facts — in other words, whether the Castillos are eligible for asylum or entitled to

withholding of deportation in light of the facts of this case. To establish eligibility for asylum, the Castillos must show that they are unable or unwilling to return to Colombia because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1158(b)(1); 8 U.S.C. § 1101(a)(42)(A). By contrast, the Castillos face a higher burden for establishing their entitlement to withholding of deportation; they must show by a preponderance of the evidence that their lives or freedom would be threatened in Colombia on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1253(h)(1) (1994); *Fahim v. U.S. Att'y Gen.*, 278 F.3d 1216, 1218 (11th Cir. 2002) ("When an alien is seeking withholding of deportation, he bears the burden of demonstrating that it is 'more likely than not' that he will be persecuted . . . upon his return to the country in question."); *see also Al Najjar*, 257 F.3d at 1274 (drawing the distinction between "eligibility" for asylum and "entitlement" to withholding of deportation).

Our review of the BIA's decision is a deferential one. *Lorisme v. INS*, 129 F.3d 1441, 1444 (11th Cir. 1997). Immigration is an area in which decisionmaking is uniquely vested in the Executive Branch. In the immigration context, government officials "exercise especially sensitive political functions that implicate questions of foreign relations." *INS v. Adubu*, 485 U.S. 94, 110, 108 S. Ct. 904, 915 (1988). Immigration decisions may affect our relations with other countries and, as the Supreme Court has noted, the judiciary is "not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such

diplomatic repercussions." *INS v. Aguirre-Aguirre*, *526* U.S. 415, 425, 119 S. Ct. 1439, 1445 (1999).

The BIA's factual determinations are reviewed under a "substantial evidence" standard. *Id.* As mandated by statute, we will affirm the BIA's determination if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." 8 U.S.C. § 1105a(a)(4).[5] We may reverse the BIA's decision only if the evidence is so overwhelming that it compels a contrary conclusion, that is, if no reasonable factfinder could fail to find the requisite fear of persecution. *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84, 112 S. Ct. 812, 817 (1992).

Although the BIA's factual determinations are subject to a deferential "substantial evidence" standard on appeal, the BIA remains constrained by the statutory language of the

5. Section 1105a of Title 8, which codified the judicial review provision of § 106 of the Immigration and Nationality Act, was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 11 Stat. 3009, and replaced by a new judicial review provision codified at 8 U.S.C. § 1252. But the new judicial review provision of IIRIRA does not apply if the final order of deportation was entered more than thirty days after September 30, 1996, and if the deportation proceedings began before April 1, 1997. IIRIRA § 309(c)(1) & (4), *reprinted in* 8 U.S.C. § 1101 (history) (1999). In such a circumstance, IIRIRA's "transitional changes in judicial review" govern. IIRIRA § 309(c). In this case, the final order of deportation was entered more than thirty days after September 30, 1996, and the deportation proceedings began before April 1, 1997. Accordingly, the transitional rules apply, and pursuant to those rules, we review the BIA's decision under the framework set forth in 8 U.S.C. § 1105a. *See Al Najjar*, 257 F.3d at 1276-77.

Immigration and Nationality Act. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48, 107 S. Ct. 1207, 1221-22 (1987). Accordingly, we review the BIA's interpretation of the INA de novo. *See id.*; *Al Najjar*, 257 F.3d at 1284. But our de novo review of the BIA's interpretation is informed by the principle of deference articulated in *Chevron, USA., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984). *Aguirre-Aguirre*, 526 U.S. at 424, 119 S. Ct. at 1445; *Cardoza-Fonseca*, 480 U.S. at 447, 107 S. Ct. at 1207. The familiar holding of *Chevron* directs that when a statute is silent or ambiguous with respect to a specific issue of statutory construction, the courts may not substitute their own construction of a statutory provision for a reasonable interpretation made by the agency to whom Congress has delegated the responsibility for administering the statutory program. *Chevron*, 467 U.S. at 844, 104 S. Ct. at 2782. As a consequence, "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *Aguirre-Aguirre*, 526 U.S. at 425, 119 S. Ct. at 1445 (internal quotations omitted); *see also Mazariegos v. Office of the U.S. Att'y Gen.*, 241 F.3d 1320, 1327 n.4 (11th Cir. 2001).[6]

---

6. In conducting our review, we examine only the BIA's decision, except to the extent that the BIA expressly adopted the IJ's opinion. *Al Najjar*, 257 F.3d at 1284. If the BIA's opinion adopts the IJ's reasoning, however, we review the IJ's decision as well. *Id.* In this case, the BIA issued a two-page opinion rejecting the Castillos' claims, but at its conclusion, the opinion stated that "the Immigration Judge's decision will be affirmed for the reasons stated therein." (Admin. Rec. at 3.) Therefore, we will also consider the IJ's decision as if it were the BIA's.

Appendix C

Mindful of our deferential role in reviewing the BIA's decision in this case, we now turn to the Castillos' claims that they are eligible for asylum and entitled to withholding of deportation. The Castillos argue that they suffered past persecution (death threats, other threats, the attempted kidnapping of Castillo-Arias, and the pistol-whipping of his son) in Colombia and, citing 8 C.F.R. §§ 208.13(b)(1) and (b)(3), they assert that the law presumes, in light of their past persecution in Colombia, that they have a well-founded fear of future persecution countrywide. They then renew their argument that this fear of persecution is "on account of" two statutorily-protected grounds: (1) a political opinion imputed to Castillo-Arias by the cartel, and (2) Castillo-Arias's membership in a particular social group composed of non-criminal informants. We address each of these statutory grounds in turn.

A. *Political Opinion*

The BIA rejected the Castillos' claim that they are eligible for asylum or entitled to withholding of deportation due to their fear of persecution on account of an imputed political opinion. We affirm. The BIA explicitly concluded that any threats the Castillos received were not due to any political opinion imputed to Castillo-Arias. This conclusion, as we noted above, is reviewed under the deferential substantial evidence standard. *See Elias-Zacarias*, 502 U.S. at 483, 112 S. Ct. at 816 (applying the substantial evidence standard to review the BIA's conclusion that an alien had not been persecuted on account of his political opinion, but instead had been persecuted on account of his failure to fight with guerrillas). There is reasonable, substantial, and probative

evidence in the record to support the BIA's conclusion. This evidence includes Castillo-Arias's admission, on cross-examination, that neither he nor any member of his family had been involved directly or indirectly with politics in Colombia. Because the facts of this case are not so compelling that no reasonable factfinder could fail to find that the Castillos were persecuted on account of an imputed political opinion, the BIA's decision in this regard must stand.

B. *Membership in a Particular Social Group*

The Castillos' second ground for relief — Castillo-Arias's membership in a particular social group — presents a much more challenging question. The BIA implicitly acknowledged two possible bases for the actions of the cartel members: retribution, and Castillo-Arias's status as an informant. Having identified two possible motives for the harm that was visited upon the Castillos, the BIA then recited the following principles of mixed-motive analysis:

> We acknowledge the fact that persecutors may have different motives for engaging in acts of persecution and proving the actual, exact reason for persecution or feared persecution may be impossible in many cases. . . . "An applicant does not bear the burden of showing the exact motivation of a 'persecutor' where different reasons for actions are possible." *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988). The "standard for review is whether the applicant has produced evidence from which it is reasonable to

> believe that the harm was motivated by a protected ground." *Matter of S- P-*, [21 I&N Dec. 486 (BIA 1996)].

(Admin. Rec. at 3.) Applying this mixed motive standard, the BIA concluded that "the record contains insufficient evidence that there was any motivation behind the actions of the cartel members against [Castillo-Arias], other than revenge for the aid he provided to the government." (Admin. Rec. at 3.)[7]

We hold that the BIA's conclusion is not supported by substantial evidence. In this mixed-motive case, Castillo-Arias need only produce evidence from which it is reasonable to believe that the harm was motivated by his membership in a particular social group. Having reviewed the administrative record and the undisputed facts in this case, we conclude that Castillo-Arias has met his burden. Although there certainly is evidence to support the BIA's conclusion that revenge was a motive in the action of cartel members, a reasonable fact-finder would be compelled to conclude that Castillo-Arias has produced evidence from which it is reasonable to believe that the harm was motivated by his membership in a group composed ofnon-criminal informants.

Our conclusion does not settle the issue, however. While we hold that a reasonable fact-finder would be compelled to conclude that Castillo-Arias has met his burden of showing that the harm was based on his membership in a group composed of non-criminal informants, the Castillos may be

---

7. The IJ reached the same conclusion. *See supra* note 6.

entitled to relief *only if* non-criminal informants are a "particular social group" within the meaning of that phrase in 8 U.S.C. § 1101(a)(42)(A). Because the BIA rested its decision upon the conclusion that there was insufficient evidence of any motive except revenge (a conclusion which we find to be erroneous), the BIA declined to consider whether non-criminal informants constitute a "particular social group" under the INA. Because the BIA's interpretation of this phrase would be entitled to *Chevron* deference if reasonable, and because "the law entrusts the agency to make the basic asylum eligibility decision here in question," *INS v. Ventura*, __ U.S. __. 123 S. Ct. 353, 355 (2002), we remand this action to permit the BIA to address this issue in the first instance.

Appendix C

IV. CONCLUSION

In light of the foregoing discussion, we AFFIRM the BIA's decision to the extent that it denied the Castillos' asylum and withholding of deportation claims based on a political opinion imputed to Castillo-Arias by the Cali cartel. But we conclude that the BIA's decision regarding the Castillos' claims based on Castillo-Arias's membership in a particular social group is not supported by substantial evidence, and VACATE the BIA's decision to the extent that it rejected these claims. Because the Castillos' eligibility for asylum and entitlement to withholding of deportation now turns upon whether non-criminal informants constitute a "particular social group" within the meaning of the INA, we REMAND this action to permit the BIA to consider in the first instance whether non-criminal informants constitute a "particular social group."[8]

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

---

8. Our opinion should not be read to foreclose the BIA from denying the Castillos' claims for relief upon any other ground that would warrant such a result.

APPENDIX D — DECISION AND ORDER OF THE EXECUTIVE OFFICE FOR IMMIGRATION DATED MARCH 20, 2002

Files: A74-661-613 - Miami
A74-661-614
A74-661-615
A74-661-616

In re: DIEGO F. *CASTILLO*-ARIAS
MARTHA L. *RINCON*-ESCOBAR
ANDRES F. *CASTILLO*-RINCON
DIEGO F. *CASTILLO*-RINCON

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Pro se

ON BEHALF OF DHS: Michael A. Mansfield
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - In the United States in violation of law (all respondents)

APPLICATION: Asylum and withholding of deportation

In a decision dated July 31, 1997, an Immigration Judge found the respondents deportable from the United States as charged, and ineligible for asylum and withholding of

deportation in the United States under sections 208(a) and 243(h)of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a), 1253(h), but granted their request for voluntary departure under section 244(e) of the Act, 8 U.S.C. § 1254(e). The appeal will be dismissed.

The respondents are natives and citizens of Colombia, who base their claim to asylum on problems they have had with the Cali drug cartel in that country. The lead respondent worked as an informant with the government, providing information on cartel activities. The respondent argues, basically, that his problems were due to a political opinion imputed to him by the drug cartel members and membership in a particular social group, that of non-criminal informants. We agree with the Immigration Judge's well-reasoned decision that the respondents have failed to adequately establish that they suffered past persecution or that they have a well-founded fear of persecution on account of a ground protected under the Immigration and Nationality Act. *INS v. Elias-Zacarias,* 502 U.S. 478 (1992); *INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987); *INS v. Stevic,* 467 U.S. 407 (1984); *Matter of S-P-,* 21 I&N Dec. 486 (BIA 1996); *Matter of Mogharrabi,* 19 I&N Dec. 439 (BIA 1987); *see also* sections 101(a)(42)(A), 208(a) and 243(h) of the Act, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a) and 1253(h); 8 C.F.R. §§ 208.13 and 16.

It appears from the record that the people who threatened the respondents did so out of personal motives and not due to any political opinion imputed to the lead respondent. *See Matter of S-P-, supra. We* acknowledge the fact that persecutors may have different motives for engaging in acts

of persecution and proving the actual, exact reason for persecution or feared persecution may be impossible in many cases. *Matter of S-P-, supra.* "An applicant does not bear the burden of showing the exact motivation of a 'persecutor' where different reasons for actions are possible." *Matter of Fuentes,* 19 I&N Dec. 658, 662 (BIA 1988). The standard for review is whether the applicant has produced evidence from which it is reasonable to believe that the harm was motivated by a protected ground." *Matter of S-P-, supra.* Here we agree with the Immigration Judge that the record contains insufficient evidence that there was any motivation behind the actions of the cartel members against the respondent, other than revenge for the aid he provided to the government. Accordingly, the Immigration Judge's decision will be affirmed for the reasons stated therein. *Matter of Burbano,* 20 I&N Dec. 872 (BIA 1994). In closing, we note that the new information submitted by the respondent, indicating that his mother received threats in Colombia does not affect the outcome of our decision.

ORDER: The Immigration Judge's decision is affirmed and the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris,* 16 I&N Dec. 168 (BIA 1977), the respondents are permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondents shall be deported as provided in the Immigration Judge's order.

s/ [illegible]
FOR THE BOARD

APPENDIX E — ORAL DECISION OF THE UNITED STATES DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT DATED JULY 31, 1997

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Miami, Florida

File No.: A 74 661 613 July 31, 1997

In the Matter of

ARIAS DIEGO F. CASTILLO[1]

Respondent

IN DEPORTATION PROCEEDINGS

CHARGES: Section 241(a) (1) (B) of the I&N Act of 1952, as amended (Act)

APPLICATIONS: Asylum; withholding of deportation; or in the alternative, voluntary departure.

---

1. Consolidated with cased number 74 661 614, that of Martha L. Rincon-Escobar, the 33-year-old spouse of the lead respondent; case number A 74 661 615, that of Andres F. Castillo-Rincon, the 9-year-old of lead respondent; and case number A 74 661 616, that of Diego F. Castillo-Rincon, the 4-year-old son of the lead respondent. All four respondents entered the United States together on February 9, 1996. *See* the Orders to Show Cause and their respective files.

Appendix E

ON BEHALF OF RESPONDENTS:

Jeffrey N. Brauwerman, Esq.
Law Offices of Brauwerman & Assoc.
1000 Briggle Avenue, No. 520
Miami, Florida 33131

ON BEHALF OF SERVICE:

Jorge J. Perez, Esq.
Assistant District Counsel, INS
Miami, Florida

ORAL DECISION OF THE IMMIGRATION JUDGE[2]

I. Background

The respondent in the lead file is a 32-year-old married, male, native and citizen of Columbia, who entered the United States in Miami, Florida, on February *9,* 1996, with his wife and two children as B-2 visitors for pleasure with authorization to remain in the United States for a temporary period, not to exceed August 8, 1996.

Pursuant to identical Orders to Show Cause dated December 10, 1996, the respondents were charged with overstay with deportability pursuant to Section 241(a)(1)(B) of the Act.[3] *See* Exhibit 1.

---

2. The Court official Spanish interpreter for the merits hearing on July 31, 1997, was Evelyn Oviedo. Neither party questioned or challenged the competency or accuracy of her translations. Nor did the Court do so, noting again, the quality and excellence of her work in this Court.

3. As the Court noted during the merits hearing, technically speaking, the correct charge is 241(a)(1)(C) of the Act. However, through custom and practice the Service has for many years used the so-called B charge as opposed to the C charge for overstays.

Appendix E

At a prior hearing conducted by the undersigned Immigration Judge on May 1, 1997, through counsel, the respondents admitted the factual allegations in their respective Orders to Show Cause and conceded the charge of deportability pursuant to Section 241(a)(1)(B) of the Act. At that time, counsel for the respondents requested relief from deportation in the form of: asylum; withholding of deportation; or, in the alternative, voluntary departure.

A merits hearing was scheduled and conducted on the various forms of relief requested on July 31, 1997.

II. (Indiscernible) and Other Evidence

The Court identified on the record of the proceedings the following exhibits, all of which were admitted into evidence without objection by either party: Exhibit 1 in each of the four files, the Order to Show Cause dated December 10, 1996; Group Exhibit 2, the asylum application executed by the lead respondent in 1996 with numerous documents attached thereto; Exhibit 3, a cover letter dated May 9, 1997 from the State Department enclosed with is an April 1997 State Department Profile on Asylum Claims and Country Conditions for Columbia; Group Exhibit 4-1 through 4-35, additional documents in support of the asylum application at Group Exhibit 2; and, Group Exhibit 5-36 through 5-43, additional documents in support of the asylum application.[4]

4. The documents at Group Exhibit 5 were filed with the Court two days prior to the merits hearing and because they were reasonably lengthy, the Court did not have an opportunity to review them before the merits hearing and they were submitted in less than 10 days prior (Cont'd)

Appendix E

The Court noted with regard to the documents attached to Group Exhibits 2, 4, and 5, respectively, to the extent that those documents include letters, affidavits, and other foreign documents, the Court admitted them into evidence with the understanding that the probity value of the documents would be dependent on both their authenticity and the ability of the Government attorney and the Court to question the declarance/affiants regarding those documents. However, as the Court also noted, consistent with 8 C.F.R. Part 3 under regulations, hearsay is admissible in these proceedings.

Essentially, only one witness testified at the merits hearing, the lead respondent. Although counsel for the respondents had the 9-year-old son of the lead respondent go to the witness chair to testify, after consultation with the parents of the respondents and Government counsel and the Court, it was agreed that a proffer would be made in lieu of having testimony of the 9-year-old son of the lead respondent. Because that proffer is a corroboration of testimony of the lead respondent, the Court will simply at this time summarize that proffer as follows: the 9-year-old son of the respondent will be 10 on November 13, 1997, he is in good health, while riding a bicycle with his father on or about May 15, 1995, he and his father were stopped by people in a car which resulted in the people in the car attacking his father, the son screamed out, they then pistol-whipped him, resulting in severe damage to his mouth and jaw, which necessitated a complete

(Cont'd)
to the hearing, consistent with the local operating procedures of the Court, the Court initially was disinclined to admit those documents into evidence. However, because Government counsel did not oppose their admission, the Court admitted them into evidence.

reconstruction of his mouth, the jaw area and extensive hospitalization.

The remainder of the testimony was that of the lead respondent. Because of the thorough and complete discussion of the testimony of the respondent both when he testified today and in the course of his response to Part C, paragraph 1, at page 4 of his asylum application, Group Exhibit 2, including the attachment thereto, consisting of two additional pages, the Court will simply summarize the evidence in this case, which neither counsel or the Court dispute. Moreover, the Court notes that while it will make a separate credibility determination in this case as it is required to do in every case by the Board of Immigration Appeals, the Court also notes at this juncture that it found credible the testimony of the lead respondent and in hence the Court did make a separate affirmative credibility determination as to his testimony. *See* Part III, *infra.*

Essentially, the respondent was born and raised in Cali, Columbia. Cali, Columbia, was and remains the headquarters of the infamous Cali Drug Cartel. At one time, that Cartel was the principle source of cocaine and certain other controlled substances that were manufactured outside the United States and transported into the United States for consumption when in this country. Respondent stated that he is married and has two children. He said that he has been married for more than 10 years. He stated that he was educated at the college level completing his degree in industrial engineering in 1992. While in college, he opened a bakery in Cali, with his wife. Respondent testified at length that he was an acquaintance of Arturo Davila, formerly, a

policeman in the Cali Police Department. Respondent testified that Mr. Davila was fired by that police department for corruption and subsequently he became the chief of security for the Cali Cartel. Additionally, the respondent was a good friend of one Vladimir Martinez Meza, who he had known since childhood. Respondent stated that Vladimir is a State Attorney/agent of the Columbia's Attorney's General Office, who the respondent referred to when he testified as General Counsel for the City of Cali with responsibility for investigating and prosecuting so-called drug traffickers or narco traffickers in Cali.

In essence, the respondent stated that between approximately 1990 and 1994, Arturo Davila would come into his bakery on the weekends and chat at length with the respondent. Indeed, he talked openly if not brazenly about his involvement with the Cali Cartel, naming names, places, and events. Specifically, Mr. Davila informed the lead respondent his close ties with the infamous Rodriguez brothers which at the time ran the Cali Drug Cartel. He also mentioned Santa Cruz Londono, who is involved with the same activities. However, Mr. Davila told the lead respondent that these individuals were involved in drug trafficking including the exportation from Columbia through a third country to the United States of substantial quantities of narcotics to both the United States and to Europe. According to the lead respondent, he decided to become an informant for the government as a civic-minded citizen of Cali. He testified that he passed along information which he learned from Arturo Davila to Vladimir Martinez Meza, including the statement that the Cali Cartel had declared war against the government of Columbia and that they would target for

killing politicians who opposed their cartel. He also disclosed to the lead respondent, who in turn passed this information along to Mr. Martinez Meza, the extent, location and size of the assets of the Cali Cartel, including banks, bank accounts, mansions, haciendas, villas, and other assets both within and outside Columbia. The lead respondent said that he last spoke with Mr. Davila in early 1995 and that he has upon information and belief that Mr. Davila was murdered but that alleged assassination is still under investigation by the Columbian government. By contrast, the lead respondent stated that his friend, Martinez Meza, is now living in Spain because of prior attempts against his life by the Cali Cartel. Respondent asserts that like Mr. Martinez Meza, he was also forced to leave Columbia for the United States to save himself and members of his family.

In particular, the respondent related the initial incident which serves as the factual predicate for his asylum claim. On May 15, 1995, while his son, Andres, was riding a bicycle, a car with three men in it blocked their path. The men got out of the car with pistols and an automatic weapon in the hands of at least one of them, they tried to force the lead respondent into their car, he resisted, he was forced to the ground and they began to beat upon him. His son, Andres, then screamed at which point at least one of the men hit Andres in the face, jaw, and mouth with his pistol. His screaming and the commotion caused people in the neighborhood to come out from their homes, which in turn caused the three men to flee the scene in their car. However, when doing so, they informed the lead respondent that things would not stay like this, would only get worse for him and his family, and they would also get the Counsel, referring by

that name again to Vladimir Martinez Meza. The lead respondent immediately took his son, Andres, to the clinic. He closed the bakery, and he went to his parents home for the remainder of the month. At the time his parents were living in the northern section of Cali. According to the respondent, his friend, Vladimir Martinez Meza, recommended to him that he go into hiding, and ultimately, because it was necessary for the government of Columbia to secrete Mr. Martinez Meza from Columbia to Spain, they also recommended that the respondent leave Columbia.

According to the respondent, he remained with his parents until he left Columbia. He initially left Columbia for the United States by visa on or about June 27, 1995, approximately 6 weeks after the incident of May 15, 1995. In the meantime, he rented the bakery but his lessees at the bakery were intimidated by individual who would come and asking the whereabouts of the lead respondent and threatening harm if they did not disclose his whereabouts. Indeed, they physically attacked his baker on more than one occasion when they thought that that baker knew where the respondent was and when he refused to tell them, they harmed him. As a result, the baker quit, and, indeed, thereafter, it was difficult for the respondent to maintain employees as this bakery. However, in April 1997, the parents of the lead respondent and his two sisters (one younger, one older) left Columbia for Germany where they live today. *See* Group Exhibit 5.

Respondent stated that his parents had a wholesale business that dealt with canned goods and liquor. According to the lead respondent, like the lead respondent, they were

forced to relocate three times within Cali before they left the country for Germany. He indicated that it was also necessary to move the bakery because of problems of the same nature and that it is now vacant and for sale.

The respondent was also qualified for the alternative form of relief of voluntary departure during direct examination by his counsel. The Court also deems all four respondents to have been similarly qualified for voluntary departure on the basis of the fact that the lead respondent was qualified for voluntary departure on behalf of all members of the family.

Government counsel engaged in brief cross-examination of the respondent. It was confirmed during cross that the respondent and members of his family were never involved, directly or indirectly, in politics in Columbia. Nor was the lead respondent or members of his family ever imprisoned or detained by the government or by those the government could not or would not control. Respondent also admitted when questioned by the government that he was not forced by the government to inform on the Cali Cartel, but rather he did so voluntarily as part of his civic duty. He also admitted during cross that he never attempted to relocate within Columbia, asserting that while he thought about it, given the power of these people, he decided not to attempt to do so, particularly given that his friend, Vladimir Martinez Meza, was forced to leave Columbia. It was also asked if his family members in Germany had applied for asylum and he replied, no, they did not. It was also asked whether he remained in the United States after he came here in June 1995. He replied, no, he returned to Columbia in August

1995, at which time he obtained from the government in Bogota necessary visas so that he could then arrange to bring his family to the United States. Indeed, he also informed the Court that he returned to the United States approximately one week late, on August 29, 1995, and remained here until November 14, 1995. On that date, he returned to Cali where he remained in his parents home with his wife and two children and his parents and two sisters until the lead respondent, his wife and two children, left Columbia for the final time on February 6, 1996, coming to the United States, where they presently reside. Furthermore, Government counsel asked the lead respondent whether he ever testified as a witness in a drug trial and he replied, no. It was also asked if he was aware that the infamous Rodriguez brothers who had been head of the Cali Cartel are now in jail there and he replied, yes, he was aware of that. There was also a brief discussion about the attack on his son on May 15, 1995.

The Court also briefly questioned the respondent to confirm certain facts that were presented in the asylum application with supporting documents and which were inferred in the testimony presented during direct and cross-examination. A summary of that questioning is included in the transcript of the hearing and will not be repeated here as the essence of the claim, as noted by counsel for the respondents, is whether or not legally speaking the respondents, through the lead respondent, can establish either past persecution or a well-founded fear of persecution either on account of membership in a particular social group or political opinion imputed to the lead respondent by his persecutors.

Appendix E

The Court will, therefore, merely summarize at this point the closing statements that were well stated by both counsel.

Counsel for the respondents asserted that the factual record in this case is clear and that the testimony presented both verbally and documentary was clear and credible. He stated that it is merely an issue of law as to whether pursuant to *Matter of Fuentes,* 19 I&N 658 (BIA 1988) and *Matter of S-P-,* Int. Dec. 3287 (BIA 1996), the respondent has established his membership in a particular social group on the basis of the amenable characteristic as a former informant for the government against the Cali Cartel much as the policeman in that case was arguably, as the Board recognized in that case, a member of a particular social group. Similarly, he argued that political opinion can be imputed based on direct or circumstantial evidence of persecution on one or more of the five grounds, as the Board observed in *Matter of S-P-, supra.* Furthermore, he argued that relocation for the respondents from one place in Columbia to another would make no sense given the fact that if the prosecutor was not able to relocate and had to leave and go to Spain, then why would the government expect the respondent and his family to relocate within Columbia. Furthermore, the family of the respondent also had to leave Columbia with his parents and two sisters going to Germany where they now live. Finally, articles in Group Exhibit 5 highlight the problem that the current administration of President Sampor in Columbia has because of their excessively close ties to the Cali Drug which allegedly helped to finance their election in the last national elections there.

Appendix E

Counsel for the Service stated its position as follows. No nexus was shown between the actions taken against the lead respondent, his son, and his family and any of the five protected grounds (race, religion, nationality, membership in a particular social group, or political opinion). Government counsel stated that while this is a sympathetic case, it would stretch indicta in *Fuentes* to grant relief in this case. Moreover, Government counsel asserts that since the lead respondent voluntarily chose to provide the information to the Government, this was not a forced act on his part and hence, the assertion of imputable political opinion is more strained. Moreover, he asserts that the respondent is not in the same position as the prosecutor who did, in fact, prosecute the drug cartel and was forced to leave the country. He also noted that the individuals with whom the respondent had this nexus, the Rodriguezs, are jailed and his informant source, Mr. Davila, is presumably dead. Finally, the Government stated that because there's no evidence of any effort on the part of the respondents to relocate within Columbia, that the Court must deny asylum.

In brief rebuttal, counsel for the respondents asserted that the forces of evil in Columbia, which were there when he left Columbia, are still there and that the difference between the position of the prosecutor and the informant in this case are more similar than dissimilar. Further, he noted that while the Rodriguez's may be imprisoned, they are still running the cartel from prison, and that the government of Columbia is unable to protect its citizens including the respondent and his family. Therefore, he asserts the Court should apply *Fuentes* and *S-P-* to the respondents.

Appendix E

III. Credibility and Determination

The Court observed the demeanor of the lead respondent when he testified. There was nothing untoward or suspicious in his demeanor.

With regard to the credibility of the testimony presented, particularly when that testimony is compared with both the asylum application and supporting documents and other documents that are included in the record at Group Exhibits 4 and 5, respectively, it is clear and all parties in these proceedings agree, the lead respondent was a credible witness and the evidence presented was credible. Therefore, the Court has made a favorable credibility determination as to the testimony of the respondent and the Court concedes, particularly given the lack of objection by Government counsel, that the documentary evidence provided in support of the testimony is also credible. *See Matter of Douralo,* 18 I&N Dec. 37 (BIA 1981).

IV. Asylum/Withholding of Deportation

To establish eligibility for asylum under the meaning of Section 208 of the Act, an alien must meet the definition of a refugee within the meaning under Section 101(a)(42)(A) of the Act by demonstrating that he or she is unwilling or unable to return to his country because of past persecution or a well-founded fear of persecution in the future on account of his race, religion, nationality, membership in a particular social group, or political opinion.

Appendix E

To establish past persecution, respondent must establish such significant or severe past persecution as in cases such as *Matter of Chen,* 29 I&N 16 (BIA 1989); in *Singh v. Hilchard,* 63 F.3rd 1501 (9th Circuit 1995), sets that a rebuttal of presumption arises an alien who had been persecuted in the past either by his country's government or by those the government of his country cannot or will not or should not or otherwise seem incapable controlling, is eligible to be considered for asylum on the basis of that past persecution, unless the Service establishes sufficiently changed country conditions such that asylum should be denied either on the basis of the changed country conditions or because as a matter of discretion, the Court should decline to exercise its discretion consistent with the totality of the circumstances standard adapted by the Board in *Matter of Pula,* 19 I&N Dec. 467, 473 (BIA 1987).

Alternatively, a well-founded fear of persecution in the future is established if the respondent can demonstrate both a subjective fear of persecution and that objectively speaking that fear is reasonable. *See Matter of Mogharrabi,* 19 I&N Dec. 439, 445, 446 (BIA 1987); and *Nkacoang v. INS.,* 83 F.3rd 53 (11th Cir. 1996).

In the instant case, this case falls squarely within two specific Board precedents. First, in *Matter of Pierre,* 15 I&N Dec. 461 (BIA 1975), the Board stated that aliens fearing retribution of a purely personal matters will not be granted asylum on that basis. While such persons may well have a fear of harm, that harm is not deemed to be on the basis of any of the five particular grounds, but rather on the basis of retribution. The Board reaffirmed the viability of that decision

in *Mater of Y-G,* 29 I&N Dec. 794 at 799-800 (BIA 1994). While counsel for the respondent asserts that this case falls squarely within or reasonably within *Matter of Fuentes, supra,* the Court also notes that the Board recognized in that case that an applicant for asylum bears the burden of establishing facts in which a reasonable person would fear that the danger arises on account of his race, religion, nationality, membership in a particular social group, or political opinion. *See Fuentes* at 662. Nor does the Court feel that *In Re S-P-, supra,* is applicable here since the Court clearly noted when it cited favorably *Singh v. Hilchard, supra* at page 12 of that decision, that the abuse must be directed towards modifying or punishing poland opinion held, imputed, or neutral. In the instant case, it is clear and evident to the Court that the basis for asylum in this case is retaliation against the respondent and all members of his family because of his voluntary decision to be an informant against the Cali Cartel. It is clear from his testimony and the documents provided that that, in fact, is the reason why they threatened him with harm and why he was forced to leave the country. Because no nexus has been drawn or shown between the attack of May 15, 1995 against the respondent and his son and subsequent threats of attack, the Court can only conclude that absence such nexus, the Court is not in a position, particularly given the narrow delegation of authority from the Attorney General to the Immigration Court, pursuant to Section 101(b)(4) of the Act, defined such nexus. *See Rebollo-Jovel v. INS,* 794 F.2d 441, 447-448 (9th Cir. 1986).

Similarly, in applying the same analysis, it follows that the respondents have also failed to satisfy the high burden

of proof of clear probability of persecution for withholding of deportation, pursuant to Section 243(h) of the Act. *See INS v. Stevick,* 467 U.S. 407 (1984).

V. Voluntary Departure

The Court finds and so notes that all four respondents are statutorily eligible for the alternative form of relief of voluntary departure pursuant to Section 244(e)(1) of the Act. Because the Court is aware that this set of cases addresses a legal rather than a factual issue, an appeal from the decision will follow as surely as night follows day. Therefore, the Court will, in exercising its discretion to grant voluntary departure, limit the period of voluntary departure to the period of time during which an appeal to this decision can be filed with the Board of Immigration Appeals, that is, through September 2, 1997. *See Matter of Thomas,* Int. Dec. 32, 45 (BIA 1995).

ORDER

IT IS HEREBY ORDERED that respondents' application for asylum/withholding of deportation be denied;

IT IS FURTHER ORDERED that respondents' application for voluntary departure is granted for each of the four respondents through September 2, 1997, with an alternative order of deportation to Columbia;

IT IS FURTHER ORDERED that these proceedings be closed.

_____

HARRY L. GASTLEY
Immigration Judge

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 4, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-14662-EE

DIEGO F. CASTILLO-ARIAS,
MARTHA L. RINCON-ESCOBAR,
ANDRES F. CASTILLO-RINCON,
DIEGO F. CASTILLO-RINCON,

Petitioners,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BIRCH and MARCUS, Circuit Judges, and NANGLE*, District Judge.

---

* Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

Appendix F

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE